92-929

No.

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

METROPOLITAN SCHOOL DISTRICT OF WAYNE TOWNSHIP, MARION COUNTY, INDIANA, on behalf of itself, and all others similarly situated,

Petitioner,

v.

ROBERT R. DAVILA, Assistant Secretary, Office of Special Education and Rehabilitative Services, United States Department of Education,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Department of Education reads part B of the Individuals with Disabilities Education Act ("IDEA-B") as requiring schools to continue to educate disabled students expelled for reasons unrelated to their disabilities (e.g., a deaf student selling drugs on school grounds) even though schools would not continue to educate other students under the same circumstances. The questions presented are:

1. Whether the Department of Education's rule is "interpretive" and thus exempt from notice and comment when the agency's rule contradicts a prior interpretation of the IDEA-B by a federal court of appeals.

2. Whether the rule is exempt from notice and comment because the agency interpreted the IDEA-B, even though the agency also exercised delegated legislative authority with the full force and effect of law that had a substantial impact on schools across the country.

3. Whether the rule can be exempt from notice and comment when Congress delegated lawmaking authority with the express and unique limitation, "No other less formal method of implementing such provision is authorized."

PARTIES BELOW

The parties below include the named plaintiff, Metropolitan School District of Wayne Township, Marion County, Indiana, and a certified class of all public school corporations in the State of Indiana. The defense of the appeal to the Seventh Circuit and this petition have been filed on behalf of the named plaintiff and the certified class.

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METROPOLITAN SCHOOL DISTRICT OF WAYNE TOWNSHIP, MARION COUNTY, INDIANA, on behalf of itself, and all others similarly situated,

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Metropolitan School District of Wayne Township, Marion County, Indiana (the "School District"), on behalf of itself and all others similarly situated, by counsel, pursuant to S.Ct. Rule 14, respectfully petitions this Court for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 969 F.2d 485 and is reprinted in the appendix. Pet. App. A 1a-16a. The district court's opinion is reported at 770 F.Supp. 1331 and is reprinted in the appendix. Pet. App. B 17a-30a.

JURISDICTION

The School District invoked federal jurisdiction in the district court under 28 U.S.C. § 1331 and the Administrative Procedure Act, 5 U.S.C. § 702. The court of appeals reversed the district court on July 30, 1992 and denied the School District's timely petition for rehearing with suggestion for rehearing *en banc* on September 1, 1992. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant section of the Administrative Procedure Act, 5 U.S.C. § 553, is reproduced at Pet. App. C 31a-32a. Relevant sections of part B of the Individuals with Disabilities Education Act, formerly the Education of the Handicapped Act of 1975, 20 U.S.C. §§ 1412, 1417, are reproduced at Pet. App. D 33a-38a.

STATEMENT

Part B of the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1411-20 ("IDEA-B" or "Act"), formerly called the Education of the Handicapped Act of 1975, has provided federal funding to states to support the education of disabled children for over fifteen years. In order to qualify for funds, a state must establish a policy assuring a free appropriate education ("FAPE") to all disabled children. 20 U.S.C. § 1412(1). Most states distribute the federal monies to local educational agencies that provide services to eligible children. The Office of Special Education and Rehabilitative Services of the United States Department of Education ("OSERS") administers the Act.

In 1989, Frank E. New, Director of Special Education for the Ohio Department of Education, sent an inquiry to Robert R. Davila, Assistant Secretary for Special Education and Rehabilitative Services. New asked Davila whether the IDEA-B required states to provide educational services to disabled children who were expelled or suspended for reasons unrelated to their disability. For example, consider two students—one deaf and the other with hearing. Assume the two students are selling drugs together on school grounds and that after a case conference, it is determined that deafness has no relationship to drug selling. New's letter asked whether school districts could discontinue educational services to both students or whether FAPE required schools to continue to educate the deaf student but not the hearing student.

Davila wrote a three page response to New (the "New Letter," reprinted Pet. App. E 39a-42a). Davila interpreted the IDEA-B to require states and schools to continue educational services in cases of expulsion even when there was no causal relationship between the student's disability and the conduct. The New Letter states that this interpretation of IDEA-B applies to *all* recipients of funds under the Act.

The Department of Education did not publish the New Letter in the Federal Register or the Code of Federal Regulations. The agency did not solicit public comment before issuing the New Letter. The Department of Education held no public proceedings on the New Letter. These relevant facts are undisputed.

A.
The District Court Proceeding.

The School District brought this action alleging that the New Letter was a legislative rule subject to notice and comment under the Administrative Procedure Act ("APA"). Davila answered that the New Letter was an interpretive rule exempt from the APA's notice and comment requirements. On cross-motions

for summary judgment, the district court framed the issue as whether "the New Letter is a 'legislative rule' requiring notice and comment under the APA, or, . . . merely an 'interpretive rule' exempt from the APA's requirements." Pet. App. 26a.

The district court ruled the New Letter to be a legislative rule subject to notice and comment for, *inter alia*, three reasons. First, the New Letter could not be an interpretation of the IDEA-B because Davila's interpretation was contrary to a prior federal court of appeals interpretation of the IDEA-B. Pet. App. 28a-29a (citing *Doe by Gonzales v. Maher*, 793 F.2d 1470, 1482 (9th Cir. 1986), *aff'd on other grounds sub. nom.*, *Honig v. Doe*, 484 U.S. 305 (1988)). Second, the New Letter imposed a new and mandatory duty upon all school districts in the United States without notifying school districts of the change in policy. Pet. App. 28a. Third, the New Letter had a substantial impact on the School District, on the class consisting of all school districts in Indiana, and on all school districts across the country. Pet. App. 19a.

The district court also relied upon the statutory language of the IDEA-B limiting the agency's lawmaking authority. Pet. App. 27a. Congress delegated legislative authority to the agency with the express limitation, "No other less formal method of implementing such provisions is authorized." 20 U.S.C. § 1417(b). In the district court's judgment, the New Letter violated 20 U.S.C. § 1417(b) as well as the APA.

B.
The Court of Appeals' Decision.

The court of appeals reversed the judgment of the district court. The court of appeals held that the notice and comment procedures required by the APA were unnecessary. The New Letter, the court of appeals held, was an interpretation of IDEA-B, not a legislative rule. Pet. App. 12a.

The court of appeals admitted that the distinction between interpretive and legislative rules is "far from crystal-clear." Pet. App. 6a (quoting *Chemical Waste Management, Inc. v. EPA*, 869 F.2d 1526, 1534 (D.C. Cir. 1989)). The court of appeals continued by noting two different tests for distinguishing interpretive and legislative rules. Pet. App. 7a. The court of appeals applied one test, finding that the other was of "limited value." Pet. App. 8a. Under the test adopted, the court of appeals found that the New Letter was an interpretive rule because (1) the agency said the New Letter was an interpretive rule and (2) the agency rule was based on the language and legislative history of the IDEA-B. Pet. App. 8a-9a, 12a.

The court of appeals did not consider the district court's reliance on the Ninth Circuit's decision in *Maher*, 793 F.2d at 1482. Instead, the Seventh Circuit addressed this Court's affirmance of that decision on other grounds in *Honig v. Doe*, 484 U.S. 305 (1988). Pet. App. 14a-15a. The court of appeals found that *Honig* did not reach the question at issue in this case. Pet. App. 15a.

The court of appeals also did not consider, as the district court did, the substantial impact on the School District. Pet. App. 14a. The court of appeals found that "[p]revailing authority" no longer examined substantial impact as a factor when deciding whether a rule was legislative or interpretive. *Id.* The court of appeals found the district court's reliance on substantial impact to be irrelevant. *Id.*

The court of appeals finally held that the New Letter did not violate 20 U.S.C. § 1417(b). Section 1417(b), the court of appeals reasoned, was designed to ensure that the rules necessary to implement the IDEA-B would be in place early enough to allow states to fulfill their statutory obligations by the effective date of the statute. Pet. App. 15a. The limit on the Department of Education's legislative authority did not apply to the New Letter.

REASONS FOR GRANTING THE WRIT

This Court should grant a writ of certiorari for three reasons. First, the federal appellate courts use different tests and factors leading to conflicting decisions on whether a particular rule is legislative or interpretive. In this case, the Department of Education's alleged interpretation in the New Letter contradicts a judicial interpretation of the IDEA-B by a federal court of appeals. *Maher*, 793 F.2d at 1482. The New Letter also has a substantial impact on the School District. Some federal appellate courts would find these factors dispositive and hold the rule legislative, while others disregard them as irrelevant and find the rule interpretive. This case is a excellent vehicle to resolve these conflicting tests and factors.

Second, the court of appeals found the New Letter interpretated the IDEA-B and thus was exempt from notice and comment despite the contrary and prior federal court of appeals' interpretation of the IDEA-B. *Maher*, 793 F.2d at 1482. The Seventh Circuit's opinion is in direct conflict with a federal court of appeals' decisions holding that when an agency rule interpreting a statute contradicts a prior interpretation of that same statute by a federal court of appeals, the rule cannot be interpretive despite agency claims to the contrary. *Chamber of Commerce v. OHSA*, 636 F.2d 464 (D.C. Cir. 1980).

Third, the issue of disciplining school children whose conduct is unrelated to their disability differently than other school children for the exact same conduct is of exceptional and manifest national importance. Disparate disciplinary treatment of disabled students erodes the personal responsibility necessary for educational growth. Unequal treatment also has a huge fiscal impact on schools. The School District will be required to spend between $100,000 to $300,000 more per year as a result of the New Letter. The School District is the named plaintiff on

behalf all of Indiana's 392 school districts. The special treatment of disabled students in these circumstances also negatively affects schools beyond Indiana, including all schools in the United States and territories that receive funds under IDEA-B.

I.
THE CONFLICTS IN THE LOWER COURTS IN DISTINGUISHING LEGISLATIVE FROM INTERPRETIVE RULES HAVE ARISEN FROM DOCTRINAL UNCERTAINTY

The APA requires agencies to afford notice of a proposed rule and opportunity for public comment prior to a rule's promulgation. 5 U.S.C. § 553. Congress carved out an exception to the notice and comment requirement for "interpretive rules." 5 U.S.C. § 553(b)(A). Federal courts of appeal have issued conflicting opinions on what agency rules fit within the interpretive rule exception.

The court of appeals in this case admitted that the distinction between interpretive and legislative rules is "far from crystal-clear." Pet. App. 6a (citation omitted). The District of Columbia Circuit stated that the distinction between legislative rules and interpretive rules is "tenuous," "fuzzy," and "blurred." *Community Nutrition Institute v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987) (citations omitted). Other circuits have also noted the doctrinal uncertainty in distinguishing between interpretive and legislative rules. *Jerri's Ceramic Arts, Inc. v. Consumer Product Safety Commission*, 874 F.2d 205, 207 (4th Cir. 1989)("a distinction between 'interpretive' rules and 'something more,' i.e., 'substantive' or 'legislative' rules, is not always easily made"); *Story v. Marsh*, 732 F.2d 1375, 1384 (8th Cir. 1984)("characterization of a rule as substantive or procedural is a matter . . . 'enshrouded in considerable smog'")(citation omitted); *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 909 (5th Cir. 1983)(noting "fuzzy perimeters" of interpretative rule exception); *Noel v. Chapman*, 508 F.2d 1023, 1030 (2d Cir.), *cert. denied*, 423 U.S. 824 (1975) (distinction

"enshrouded in considerable smog"). Administrative law commentator Professor Kenneth Culp Davis stated, "the problem is baffling." 2 Kenneth Culp Davis, *Administrative Law Treatise* §7:5 at 32 (2d ed. 1979).

A.
Different Circuits Apply Different Tests

In this uncertain legal landscape, different tests have been used to determine what qualifies as an interpretive rule exempt from notice and comment. The Seventh Circuit in this case adopted the test set forth in 1984 by the District of Columbia Circuit *en banc*:

> First, the agency's own label, while relevant, is not dispositive.... An interpretative rule simply states what the administrative agency thinks the statute means, and only "'reminds' affected parties of existing duties." On the other hand, if by its action the agency intends to create new law, rights or duties, the rule is properly considered to be a legislative rule.

General Motors Corp. v. Ruckelshaus, 742 F.2d 1561, 1565 (D.C. Cir. 1984)(en banc), *cert. denied*, 471 U.S. 1561 (1985); Pet. App. 6a-7a. If the agency claims that the rule is interpretive and the agency intends to interpret a statute, then the rule is interpretative and exempt from notice and comment under *General Motors*. In *General Motors*, the court of appeals held the rule to be interpretive.

Three years after the District of Columbia Circuit enunciated the test in *General Motors*, a different panel of that same circuit applied a different test. *Community Nutrition*, 818 F.2d at 946-948. The test focused on two factors. First, whether the language employed by the agency in creating and describing the rule suggested that the agency rule had present binding effect.

The court of appeals wrote, "[M]andatory, definitive language is a powerful, even potentially dispositive, factor suggesting that [agency rules] are substantive." *Id.* at 947. Second, whether the rule limited the agency's discretion. The appellate court stated, "[C]abining of an agency's prosecutorial discretion can in fact rise to the level of a substantive, legislative rule." *Id.* at 948 (citing *Guardian Federal Savings & Loan Association v. FSLIC*, 589 F.2d 658, 666-667 (if so-called interpretive rule "is in purpose or likely effect one that *narrowly limits administrative discretion*, it will be taken for what it is—a binding rule of substantive law")(emphasis added)). In *Community Nutrition*, the court of appeals held the rule to be legislative. *See also State of Alaska v. U.S. Department of Transportation*, 868 F.2d 441 (D.C. Cir. 1989) (applying *Community Nutrition* test to conclude rule was legislative)).

Another test, one noted by the Seventh Circuit, was developed by Professor Davis for distinguishing interpretive rules from legislative rules:

> [R]ules are legislative when the agency is exercising delegated power to make law through rules, and rules are interpretative when the agency is not exercising such delegated power in issuing them. When an agency has no granted power to make law through rules, the rules it issues are necessarily interpretative; when an agency has such granted power, the rules are interpretative unless it intends to exercise the granted power. . . .

Pet. App. 7a-8a (quoting 2 Kenneth Culp Davis, *Administrative Law Treatise* § 7.10 at 54 (2d ed. 1979)); *see also Chamber of Commerce*, 636 F.2d at 468. If Congress has delegated lawmaking authority to the agency and the agency did not intended to exercise that delegated lawmaking authority, then the agency's rule is interpretive.

The Seventh Circuit found Professor Davis' test to be of "limited value when an agency, like the Department of Education, has both delegated rulemaking authority and the power to issue interpretive rules." Pet. App. 8a. Nonetheless, the court of appeals in *Chamber of Commerce* applied Professor Davis' test to the Department of Labor, an agency with both legislative and interpretive authority. The District of Columbia Circuit in that case held that the Assistant Secretary of Labor had promulgated a legislative rule.

A recent federal court of appeals opinion applied yet another test that turned on whether the agency rule constituted a change in existing law, policy, or practice:

> This court has determined that a rule is substantive if it is promulgated pursuant to a direct delegation of legislative power by Congress and if it changes existing law, policy or practice. A rule is interpretive if it is promulgated by an agency having authority to issue substantive rules and if it attempts to clarify an existing rule but does not change existing law, policy, or practice.

Rocky Mountain Helicopters, Inc. v. FAA, 971 F.2d 544, 546-547 (10th Cir. 1992)(citations omitted). The court of appeals in *Rocky Mountain Helicopters* found the FAA's rule prohibiting night vision goggles did not constitute a change in existing law, policy or practice. *Id.* at 547. The appellate court also noted the lack of a "uniform approach" in deciding whether a rule is legislative or interpretive, giving examples of five different tests. *Id.* at 547 n.2.

B.
Some Circuits Consider The "Substantial Impact" Factor, Others Do Not

In addition to different tests, the courts of appeals conflict on whether substantial impact is a factor to be considered in deciding whether a rule is legislative or interpretive. The district court relied upon the New Letter's substantial impact on the School District and all school districts in Indiana to hold the rule legislative. Pet. App. 19a. The court of appeals found the district court's reliance on substantial impact misplaced, "Prevailing authority rejects the proposition that a rule that has substantial impact is necessarily legislative." Pet. App. 14a (citing *Friedrich v. Secretary of Health & Human Services*, 894 F.2d 829, 836 (6th Cir.), *cert. denied*, 111 S.Ct. 59 (1990); *Industrial Safety Equipment Association, Inc. v. EPA*, 837 F.2d 1115, 1121 (D.C. Cir. 1988); *American Postal Workers Union v. United States Postal Service*, 707 F.2d 548, 560 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1100 (1985)).

Other circuits, however, consider substantial impact as one factor in deciding whether a rule is legislative or interpretive. *La Casa Del Convaleciente v. Sullivan*, 965 F.2d 1175, 1179 (1st Cir. 1992) ("we also look[] to the substantial impact of the rule in determining agency intent. . . . [and] as a sign that the rule is substantive rather than interpretive"); *State of Ohio Department of Human Services v. United States Department of Health*, 862 F.2d 1228, 1233 (6th Cir. 1988)("One factor that courts have considered in distinguishing between legislative and interpretive rules is the impact that a given rule has on those to whom the rule applies."); *Levesque v. Block*, 723 F.2d 175, 182 (1st Cir. 1983)(substantial impact "relevant in construing the intent of the agency in issuing the rule."); *Brown Express, Inc. v. United States*, 607 F.2d 695, 701-702 (5th Cir. 1979)(applying "substantial impact"); *Reynolds Metals Co. v. Rumsfeld*, 564 F.2d 663, 669 (4th Cir. 1977), *cert. denied*, 435 U.S. 995 (1978)(applying "substantial impact"); *National Motor Freight*

Traffic Association v. United States, 268 F.Supp. 90 (D.D.C. 1967)(Burger, McGowan, Sirica, JJ.), *aff'd*, 393 U.S. 18 (1968); 2 Kenneth Culp Davis, *Administrative Law Treatise* § 7:16 at 77-78 (some courts consider whether rule has substantial impact on those it affects).

C.
This Case Is A Good Vehicle To Resolve The Conflict

These different tests and factors that have been fully explored throughout the circuits are more than minor doctrinal differences; they have resulted in different outcomes. This case present a good vehicle to resolve the conflicting tests and factors. In this case, the district court relied upon (1) a prior and contrary interpretation of the IDEA-B by the Ninth Circuit, (2) a change in agency policy, and (3) a substantial impact on the School District and all school districts across the country. From these factors, the district court held that the New Letter was legislative rather than interpretive.

The Seventh Circuit, however, applied a different test neither quoting nor citing in any manner the Ninth Circuit's opinion relied upon by the district court. The court of appeals found that Davila thought the New Letter was an interpretation of the IDEA-B. Pet. App 8a-9a. The appellate court then noted that the New Letter relied upon the language of the statute and its legislative history. Pet. App. 12a. The two parts of the *General Motors* test indicated to the court of appeals that the New Letter was interpretive.

The *General Motors* test applied by the court of appeals, conflicts with this Court's statement that administrative interpretations of statutory terms—normally the subject of interpretive rules—may have legislative effect. *Batterton v. Francis*, 432 U.S. 416 (1977). This Court stated:

> Congress in § 407(a) expressly *delegated* to the Secretary the power to prescribe standards for determining what constitutes "unemployment" for purposes of AFDC-UF eligibility. . . . In exercising that responsibility, the Secretary adopts regulations with legislative effect.

Id. at 425 (emphasis in original). These interpretations have the "force and effect of law." *Id.* at 425 n.9. One commentator has urged courts to explicitly recognize that interpretive rules with legislative effect are promulgated pursuant to delegated authority to make law through rules therefore making the "interpretation" subject to the notice and comment requirements of § 553 of the APA. Kevin W. Saunders, *Interpretative Rules With Legislative Effect: An Analysis And A Proposal For Public Participation*, 1986 Duke L.J. 346, 382.

Furthermore, in distinguishing between legislative and interpretive rules, courts should pay heed to whether individual rights and obligations are affected. *Morton v. Ruiz*, 415 U.S. 199, 232 (1974). Many of the tests and factors adopted by the lower courts turn solely on what the agency intends, rather than whether the agency rule has a substantial impact on individual rights and duties. The doctrinal uncertainty in the appellate courts regarding the distinction between legislative rules and interpretive rules needs to be resolved by this Court.

On a practical level, school districts in the Ninth Circuit are subject to two contradictory rules. In 1986, three years prior to the New Letter, the Ninth Circuit in *Maher* stated:

> We do not hold . . . that a school may never withhold educational services from a handicapped child. If the child's behavior is properly determined not to be a manifestation of his handicap, the handicapped child can be expelled. *See Kaelin v. Grubbs*, 682 F.2d 595, 602 (6th Cir. 1982); *S-1 v. Turlington*, 635 F.2d 342, 248 (5th Cir.) (Unit B), *cert. denied*, 454 U.S.

> 1030, 102 S.Ct. 566, 70 L.Ed.2d 473 (1981); *Doe v. Koger*, 480 F.Supp. 225, 228 (N.D. Ind. 1979). This conclusion does not conflict with the [IDEA-B]. When a child's misbehavior does not result from his handicapping condition, there is simply no justification for exempting him from the rules, including those regarding expulsion, applicable to other children. Therefore, when a handicapped child is properly expelled, the school district may cease providing all educational services—just as it could in any other case. To do otherwise would amount to asserting that all acts of a handicapped child, both good and bad, are fairly attributable to his handicap. We know that this is not so.

793 F.2d at 1482 (footnote omitted). Schools in Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Oregon and Washington do not know whether to follow the Ninth Circuit's binding interpretation of the IDEA-B or the Department of Education's contrary, but likewise binding, interpretation of IDEA-B. Pet. App. 13a.

II.

WHEN AN AGENCY RULE CONTRADICTS A PRIOR FEDERAL COURT OF APPEALS INTERPRETATION THE RULE IS LEGISLATIVE, NOT INTERPRETIVE

The decision of the court of appeals conflicts with *Chamber of Commerce v. OHSA*, 636 F.2d 464 (D.C. Cir. 1980). At issue in that case was the Occupational Safety and Health Act of 1970 ("OSHA Act"), 29 U.S.C. §§ 651-678 (1976), which allows a representative authorized by employees to accompany an inspector during a walkaround inspection of the employee's workplace. The question presented was whether the Occupational Safety and Health Administration ("Administration")

needed to provide notice and comment before requiring employers to compensate employee representatives for their walkaround time.

In November of 1971, a union president filed a complaint with the Secretary of Labor alleging that an employer failed to pay employee representatives for their walkaround time. The Assistant Secretary rejected the union's claim relying in part upon the Solicitor of Labor's opinion that walkaround time was not "hours worked" under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 203(o). The union sought judicial relief. The district court upheld the Assistant Secretary's interpretation of the FLSA and OHSA Act.

On appeal, the court of appeals affirmed. *Leone v. Mobil Oil Corp.*, 523 F.2d 1153 (D.C. Cir. 1975). The appellate court held that because walkaround time primarily benefited employees and because the walkaround was conducted beyond the employer's control, walkaround time did not constitute "hours worked" under the FLSA. *Id.* at 1163-1164. Furthermore, inasmuch as neither the terms of the OSHA Act nor its legislative history offered guidance on the payment issue, the court of appeals also held that payment for walkaround time was not so essential to the OSHA Act as to compel an inference of a payment requirement from the OSHA Act itself. *Id.* at 1159-1161.

In March of 1977, a new Assistant Secretary of Labor took office. After conducting a review of the walkaround rule, the Assistant Secretary announced for the first time that "[a]ny employer who fails to compensate employees for walkaround time will be charged with discriminating against their workers under Section 11(c) of the [OSHA Act]." *Chamber of Commerce*, 636 F.2d at 466 (citation omitted). The Solicitor of Labor issued a new opinion stating that an employer's failure to pay workers for walkaround violated § 11(c) of the OSHA Act. On September 20, 1977, without any public proceedings, the Assistant Secretary promulgated what she termed an "interpretive rule and general statement of policy" declaring that "an

employer's failure to pay employees for time during which they are engaged in walkaround inspections is discriminatory under section 11(c)." *Id.* at 467 (citation omitted).

The Chamber of Commerce filed an action in district court challenging the validity of the regulation. The district court held that the regulation was interpretive and therefore exempt from the notice-and-comment requirements of the APA. On review, the court of appeals applied a test similar to the one formulated by Professor Davis:

> A rule is interpretive, rather than legislative, if it is not "issued pursuant to legislatively-delegated power to make rules having the force of law" or if the agency intends the rule to be no more than expression of its construction of a statute or rule.

Id. at 468 (citing *Joseph v. United States Civil Service Commission*, 554 F.2d 1140, 1153 n.24 (D.C. Cir. 1977)).

Congress had authorized the Secretary of Labor to issue legislative rules regarding workplace inspections. 29 U.S.C. § 657(g)(2) (1976). Ascertaining that an agency intended to exercise its legislative authority presented the District of Columbia Circuit with a "difficult inquiry." 636 F.2d at 468. An agency's own label is indicative but not dispositive; the appellate court did "not classify a rule as interpretive just because the agency says it is." *Id.* (citation omitted). Instead, "it is the substance of what the [agency] has purported to do and has done which is decisive." 636 F.2d at 468 (quoting *Columbia Broadcasting System, Inc. v. United States*, 316 U.S. 407, 416 (1942)).

Despite the Administration's claim that the challenged rule was interpretive, the court of appeals concluded that the agency intended the rule to be legislative. 636 F.2d at 468. In *Leone*, a court of appeals held that neither the terms of the OSHA Act nor the OSHA Act's legislative history nor the policies underlying the employee walkaround right required employers to

compensate employees for walkaround time. 523 F.2d at 1159-1161. The appellate court reminded the Administration that statutory interpretation by an agency is not controlling on a court. 636 F.2d at 469 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-140 (1944)).

The effect of the Administration's rule exposed the agency's intent. The Administration could not be explaining or clarifying the OSHA Act's language, for, as the court of appeals concluded in *Leone*, the OSHA Act neither prohibits nor compels pay for walkaround time. There was no "existing duty" to serve as the subject of an Administration reminder. Congress had not "legislated and indicated its will" on the question of walkaround pay, therefore the Administration must have done more than exercise its "'power to fill up the details.'" 636 F.2d at 469 (quoting *United States v. Grimaud*, 220 U.S. 506, 517 (1911) (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825)). The court of appeals stated, "It is clear to us that the Administration has attempted through the regulation to supplement the [OSHA] Act, not simply to construe it, and therefore the regulation must be treated as legislative." 636 F.2d at 469.

In this case, the effect of the New Letter exposed the Department of Education's intent. The agency could not be explaining or clarifying the IDEA-B's language, for, as the court of appeals concluded in *Maher*, the IDEA-B neither prohibits nor compels schools to continue to educate disabled students disciplined for reasons found to be unrelated to the student's disability. There was no "existing duty" to serve as the subject of Assistant Secretary Davila's reminder. Congress had not legislated and indicated its will on the question of continuation of educational services when the improper conduct is unrelated to the student's disability, therefore the agency must have done more than exercise its power to fill up the details. The

Department of Education in the New Letter has attempted through regulation to supplement the IDEA-B, not to construe it. The New Letter must be treated as legislative.

Chamber of Commerce directly conflicts with the court of appeals opinion at issue in this petition. The *Leone* decision interpreted the OSHA Act like the *Maher* decision interpreted the IDEA-B: no duty arose from the statute. The Assistant Secretary of Labor interpreted the OSHA Act after *Leone* to require walkaround pay, and the Assistant Secretary of Education interpreted the IDEA-B after *Maher* to require the continuation of educational services when disabled students are expelled or suspended for reasons unrelated to the student's disability. Both the Assistant Secretary of Labor and the Assistant Secretary of Education claimed the agency rule was interpretive and thus exempt from notice and comment. The District of Columbia Circuit in *Chamber of Commerce* required notice and comment despite the agency's claim that the rule was interpretive, while the Seventh Circuit in this case found the agency rule was interpretive and thus exempt from notice and comment.

Chamber of Commerce remains good law today. The District of Columbia Circuit cited the opinion less than one month ago when invalidating a Department of Health and Human Services rule prohibiting counseling on abortion. *National Family Planning and Reproductive Health Associations, Inc. v. Sullivan*, No. 92-5252, 1992 U.S. App. LEXIS 28469 (D.C. Cir. Nov. 3, 1992). The appellate court stated , "The proper distinction between legislative and interpretive rules is shown even more clearly in *Chamber of Commerce v. OSHA*, 636 F.2d 464 (D.C. Cir. 1975)." *Id.* at * 27. The conflicting tests and factors have resulted in conflicting results; the court of appeals decision cannot be squared with *Chamber of Commerce*.

III.
THE NEW LETTER RAISES ISSUES FOR SCHOOL DISTRICTS ACROSS THE COUNTRY THAT ARE OF MANIFEST NATIONAL IMPORTANCE

The validity of the New Letter as promulgated, without notice and comment, affects all school districts across the United States and territories. To comply with the additional duty, the School District will be required to spend an additional $100,000 to $300,000 per year. All school districts in Indiana are a part of this suit. Overall, Indiana receives over $35 million of IDEA-B funds which are now tied to the mandatory requirements of the New Letter.

The New Letter also applies to all states and school districts across the country. Pet. App. 41a. School districts from Maine to Hawaii that receive IDEA-B funds now are obliged to continue educational services even if the disabled student is disciplined for reasons unrelated to the student's handicap. The California Department of Education and the New York State School Boards Association, representing two of the nation's largest educational systems, have filed *amicus curiae* briefs in support of this petition. This case involves more than the School District, more than the school districts in Indiana, it involves every school district in the nation.

Although the fiscal impact of the New Letter is dramatic in these times of declining educational budgets, the individuals who stand to lose the most are the disabled students. Because of the New Letter disabled students will receive the message that they will be allowed to continue their studies despite serious violation of school rules. This case does not involve schools disciplining disabled students for actions directly related to their disabilities as was the case prior to the IDEA-B. Instead it involves disparate treatment of two students who commit similar acts in violation of the school code simply based upon the fact that a student receives services for a disability. The School District on behalf of all Indiana school districts asks only for an opportunity to express to the Department of Education the

devastating effect such disparate treatment will have upon the mission of the public school to instill self-discipline in all students, disabled a well as non-disabled. This is best done through the vehicle enacted by Congress for the purpose of obtaining public input in the regulatory area, the APA.

In enacting the IDEA-B, Congress delegated to the Department of Education the authority to make law under the IDEA-B. Congress, however, limited that agency's lawmaking authority in a unique manner:

> In carrying out the provision of this subchapter, the Secretary shall issue, not later than January 1, 1977, amend, and revoke such rules and regulations as may be necessary. No other less formal method of implementing such provisions is authorized.

20 U.S.C. § 1417(b). The court of appeals held that Congress designed this section to "ensure that the rules necessary to implement the [IDEA-B] would be in place early enough to allow states to fulfill their statutory obligation by the effective date of the Act." Pet. App. 15a (citing Appellant's Brief at 5-6).

Contrary to the Department of Education's unsupported assertion in its brief, § 1417(b) is not limited to the initial implementation of the IDEA-B. Such a construction of the statute renders the terms "amend" and "revoke" in § 1417(b) to be a dead letter:

> In carrying out the provision of this subchapter, the Secretary shall . . . *amend*, and *revoke* such rules and regulations as may be necessary. No other less formal method of implementing such provisions is authorized.

20 U.S.C. § 1417(b)(emphasis added). Section 1417(b) should not be construed to make the terms "amend" and "revoke" meaningless surplusage. *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 510 n.22 (an elementary canon of construction is that a statute should not be interpreted so as to render one part inoperative).

In addition to the democratic principles provided by the APA, Congress expressly limited the Department of Education's rulemaking in this delicate and sensitive area of education: "No other less formal method of implementing such provision is authorized." 20 U.S.C. § 1417(b). The court of appeals has construed the APA and this limitation in the IDEA-B to prohibit the School District, all school districts in Indiana, and all schools from across the country from receiving notice of and commenting on a Department of Education rule that will ultimately prove detrimental to students with disabilities.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 27, 1992

APPENDIX

In the
United States Court of Appeals
For the Seventh Circuit

No. 91-3386

METROPOLITAN SCHOOL DISTRICT
OF WAYNE TOWNSHIP, MARION COUNTY,
INDIANA, on behalf of itself and
all others similarly situated,

Plaintiff-Appellee,

v.

ROBERT R. DAVILA, Assistant Secretary,
Office of Special Education
and Rehabilitative Services,
United States Department of Education,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Indiana, Indianapolis Division.
No. 90 C 1435—S. **Hugh Dillin**, *Judge*.

ARGUED MAY 20, 1992—DECIDED JULY 30, 1992

Before BAUER, *Chief Judge*, POSNER, *Circuit Judge*, and GIBSON, *Senior Circuit Judge*.[1]

[1] The Honorable Floyd R. Gibson, Senior Judge for the United States Court of Appeals for the Eighth Circuit, is sitting by designation.

BAUER, *Chief Judge.* In this appeal, Robert Davila on behalf of the United States Department of Education challenges the district court's grant of summary judgment in favor of the Metropolitan School District of Wayne Township and the plaintiff class. The district court held that a letter purporting to interpret part B of the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1411-20 ("the IDEA-B" or "the Act"),[2] was a legislative ruling subject to the notice and comment procedures of the Administrative Procedure Act, 5 U.S.C. § 553 ("APA"). We reverse, and remand for entry of summary judgment in favor of Davila and the Department of Education.

I.

The IDEA-B provides federal funding to states to support the education of disabled children. In order to qualify for funds, a state must establish a policy assuring a free appropriate education ("FAPE") to all disabled children. 20 U.S.C. § 1412(1). Most states distribute the federal monies to local educational agencies that provide services to eligible children. The Office of Special Education and Rehabilitative Services of the United States Department of Education ("OSERS") administers the Act. The rule at issue here was announced by OSERS in a letter written by Davila, the Assistant Secretary for Special Education and Rehabilitative Services, in response to an inquiry from Frank E. New, the Director of Special Education for the Ohio Department of Education.

New asked whether the IDEA requires states to provide educational services to disabled children who are expelled or suspended for an extended period for reasons unrelated to their disability. In his letter, Davila stated that OSERS interpreted the IDEA to require states to

[2] This Act formerly was called the Education of the Handicapped Act of 1975. Congress changed the name, effective October 30, 1990.

continue services in these circumstances. The relevant facts are undisputed: this position was not published in the Federal Register or the Code of Federal Regulations, and public comments were not solicited before it was issued.

The School District for Wayne Township sued the Secretary on behalf of itself and all similarly situated providers of educational services. The School District asserts that OSERS' position places a large financial burden on school districts, and that the districts are entitled to notice of the proposed rule and the opportunity to comment. Both parties filed motions for summary judgment. The district court agreed with the School District that OSERS' position is a legislative rule subject to the notice and comment requirements of the APA. *Metropolitan School District of Wayne Township v. Davila*, 770 F. Supp. 1331 (S.D. Ind. 1990). The district court acknowledged that "the issue is whether . . . the New Letter is a 'legislative rule' requiring notice and comment under the APA, or . . . merely an 'interpretive rule' exempt from the APA's requirements." *Id.* at 1337.

The court applied a three-factor test to determine that the position taken in the letter is "substantive," and therefore subject to the notice and comment requirements of § 553 of the APA and to the restrictions of 20 U.S.C. § 1417(b), the section of the IDEA delegating law-making authority to the Department of Education. *Id.* at 1338. These factors were: "(1) it imposes a new and mandatory duty upon all school districts in the United States, (2) the new duty is not expressly required by EHA [now IDEA], and (3) contrary to the New Letter itself it is not required by *Honig v. Doe*, 484 U.S. 305 (1988)." 770 F. Supp. at 1338.

We believe the district court used "substantive" as a synonym for "legislative." This usage appears in several other district court opinions, most notably in the one upon which the district court relied to develop its three-factor test. *See National Treasury Employees Union v. Reagan*,

685 F. Supp. 1346, 1356 (E.D. La. 1988). *See also Energy Reserves Group v. Federal Energy Administration*, 447 F. Supp. 1135 (D. Kansas 1978). In reviewing (and reversing) *Energy Reserves*, the Temporary Emergency Court of Appeals treated "substantive" in this context as a synonym for "legislative." *Energy Reserves Group v. Federal Energy Administration*, 589 F.2d 1082, 1089 (Temp. Emer. Ct. App. 1978). *See also American Hospital Association v. Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987). For these reasons, we believe the district court here also used the terms interchangeably.

In addition to its holding that the APA requires OSERS to follow the notice and comment procedures before promulgating the position expressed in Davila's letter to New, the district court found that 20 U.S.C. § 1417(b) requires these procedures. Section 1417(b) provides:

> In carrying out the provisions of this subchapter, the Secretary shall issue, not later than January 1, 1977, amend, and revoke such rules and regulations as may be necessary. No other less formal method of implementing such provisions is authorized.

The district court interpreted this language to require that any rules the Department proposed under the Act be published in the Federal Register. *Id.* at 1337. Based upon its holding that the position announced in Davila's letter to New is "substantive" (legislative), and its reading of § 1417(b), the court concluded that the rule is invalid because OSERS failed to follow the notice and comment procedures of the APA. We find the use of the term "substantive" in this context misleading; an interpretation which explains the meaning of the statute can be just as "substantive" as a legislative rule. We prefer the interpretive/legislative terminology because it avoids any potential confusion.

II.

It is well established that review of a district court's grant of summary judgment is *de novo*. *See, e.g., La Preferida,*

Inc. v. Cerveceria Modelo, S.A., 914 F.2d 900, 905 (7th Cir. 1990). In order to uphold a grant of summary judgment, we must "view the record and all inferences drawn from it in the light most favorable to the party opposing the motion," *Lohorn v. Michal*, 913 F.2d 327, 331 (7th Cir. 1990), and conclude that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). *First Wisconsin Trust Co. v. Schroud*, 916 F. 394, 398 (7th Cir. 1990).

In this case, we believe Davila and the Department of Education are entitled to judgment as a matter of law. The APA does not require administrative agencies to follow notice and comment procedures in all situations. Section 553(b)(3)(A) specifically excludes "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice," from the notice and comment procedures. *See e.g., Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565 (1980) (discussing "information letters" containing statements which begin: "The staff's position is . . .") (quoted in *Industrial Safety Equipment Association, Inc. v. EPA*, 837 F.2d 1115, 1121 n.11 (D.C. Cir. 1988)). Based upon our review of Davila's letter and controlling authority, we conclude that the letter announced OSERS' construction of the IDEA, and hence is an interpretive rule that does not trigger the APA's notice and comment requirements.

We note briefly that this issue is ripe for review. Preenforcement review is appropriate here because the Department of Education has issued its final pronouncement on the subject, and the School District and other plaintiffs must either comply with the Department's interpretation or face potential sanctions. The Department's position mandates that states provide educational services to expelled disabled children in order to comply with the IDEA. "If a rule of conduct cannot be challenged in advance of violating it, the people subject to it are placed in a dilemma: comply with a rule that harms them and that they believe to be invalid or violate the rule at the

risk of a heavy penalty if they've guessed wrong and the rule is upheld in the penalty proceeding." *Abbs v. Sullivan*, Nos. 91-1923, 91-1924, & 91-2429 1992 U.S. App. LEXIS 111489 (7th Cir. May 1, 1992) (citing 4 Kenneth Culp Davis, *Administrative Law Treatise* § 25:6, at p. 369 (2d ed. 1983)). In this situation, the rule can be challenged directly. *Id.*

"The distinction between interpretive (or 'interpretative') and substantive (or 'legislative') rules is admittedly far from crystal-clear." *Chemical Waste Management, Inc. v. EPA*, 869 F.2d 1526, 1534 (D.C. Cir. 1989) (citing *American Hospital Association v. Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987)). *Chemical Waste* considered an EPA interpretation of a regulation which provides: "any solid waste generated from the treatment, storage, or disposal of a hazardous waste, including any leachate is a hazardous waste." 40 C.F.R. § 261.3(c)(2)(i). The EPA determined that the hazardousness of waste does not depend upon the time of its disposal, and thus materials found to be hazardous after disposal could produce hazardous byproducts requiring treatment. The court found this was a clarification of an existing regulation and hence an interpretive rule. This interpretation required treatment of materials that heretofore had not been covered by the regulation. This new obligation did not render the EPA's reading of the regulation legislative.

But we are getting ahead of ourselves. The District of Columbia Circuit, sitting *en banc*, has set forth the general principles to be used to determine whether a rule is interpretive, and, therefore, exempt from APA's notice and comment requirements. The "starting point" of the analysis is the agency's characterization of the rule. *General Motors Corp. v. Ruckleshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1074 (1985); *United Technologies Corp. v. United States Environmental Protection Agency*, 821 F.2d 714, 718 (D.C. Cir. 1987). The agency's characterization is not dispositive, but is a relevant factor. *United Technologies*, 821 F.2d at 718;

General Motors, 742 F.2d at 1565; *see also Friedrich v. Secretary of Health & Human Services*, 894 F.2d 829, 834-35 (6th Cir.) (noting Sixth Circuit's adoption of principles set out in *General Motors*), *cert. denied*, 111 S. Ct. 59 (1990).

After considering the agency's characterization, the *General Motors* court outlined the more general distinction between interpretive and legislative rules:

> An interpretive rule simply states what the administrative agency thinks the [underlying] statute means, and only reminds affected parties of existing duties. On the other hand, if by its action the agency intends to create new law, rights, or duties, the rule is properly considered to be a legislative rule.

United Technologies, 821 F.2d at 718 (quoting *General Motors*, 741 F.2d at 1565). The court in *United Technologies* reviewed the *General Motors* holding, finding that "the entire justification for the rule [reviewed in *General Motors*] was comprised of reasoned statutory interpretation, with reference to the language, purpose, and legislative history of the statute. *Id.* In other words, " 'interpretive rules are statements as to what the administrative officer thinks the statute or regulation means,' whereas legislative rules have 'effects *completely independent* of the statute.' " *Id.* (quoting *Cabais v. Egger*, 690 F.2d 234, 238 & n.9 (D.C. Cir. 1982)) (emphasis in original).

This court has noted with approval Professor Davis' test for distinguishing interpretive from legislative rules. *Production Tool v. Employment & Training Administration*, 688 F.2d 1161, 1166 (7th Cir. 1982) (quoting 2 Kenneth Culp Davis, *Administrative Law Treatise* § 7.10 at 54 (2d ed. 1979)). Davis' formulation provides:

> [R]ules are legislative when the agency is exercising delegated power to make law through rules, and rules are interpretative when the agency is not exercising such delegated power in issuing them. When an agency has no granted power to make law through rules,

> the rules it issues are necessarily interpretative; when an agency has such granted power, the rules are interpretative unless it intends to exercise the granted power. . . .

Id. As we pointed out in *Production Tool*, Professor Davis' formulation focuses upon the kind of power the agency is using, and hence the force and effect of the rule. Legislative rules have the force and effect of law—they are as binding upon courts as congressional enactments. *Id.* at 1165. Interpretive rules, although they are entitled to deference, do not bind reviewing courts. *Batterton v. Francis*, 432 U.S. 416, 425-26 & n.9 (1977); *Production Tool*, 668 F.2d at 1165. But this formulation is of limited value when an agency, like the Department of Education, has both delegated rulemaking authority and the power to issue interpretive rules. All agencies charged with enforcing and administering a statute have "inherent authority to issue interpretive rules informing the public of the procedures and standards it intends to apply in exercising its discretion." *Production Tool*, 680 F.2d at 1166 (citing *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976)). *See also American Trucking Association, Inc. v. United States*, 688 F.2d 1337, 1341 n.5 (11th Cir. 1982), *rev'd sub nom. on other grounds, Interstate Commerce Commission v. American Trucking Association*, 467 U.S. 354 (1984) (extending agency's authority). Basically, then, this test returns us to the starting point set forth by the District of Columbia Circuit—what kind of rule does the agency think it has promulgated?

Here, Secretary Davila's letter purports to be an interpretation of the IDEA. Davila based the OSERS' interpretation upon the Supreme Court's decision in *Honig v. Doe*, 484 U.S. 305 (1988), and other cases interpreting IDEA, the language of both the statute and an implementing regulation (34 C.F.R. § 300.121(a)), and the legislative history of the Act. These are the classic tools a reviewing body, be it court or agency, relies upon to determine the meaning of a statute. Thus, the first factor

in our analysis, and an "important" one according to the governing authority, weighs in favor of a determination that the rule is interpretive. *Friedrich*, 894 F.2d at 835.

Under the more general inquiry, we must determine whether the rule merely states what OSERS thinks the statute means, or creates new law, rights, or duties. *Id.*; *United Technologies*, 821 F.2d at 718. We note that a new position does not necessarily make a rule legislative rather than interpretive. *State of Michigan v. Thomas*, 805 F.2d 176, 182-84 (6th Cir. 1986); *Alcarez v. Block*, 746 F.2d 593, 613-14 (9th Cir. 1984); *American Postal Workers Union v. United States Postal Service*, 707 F.2d 548, 559-60 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984).

The district court held that the letter announced a "change in long standing policy of OSERS without a corresponding change in the underlying statute or regulations." *Metropolitan School District*, 707 F. Supp. at 1337. This holding is factually incorrect and, in this case, legally irrelevant. There is nothing in the record to indicate that OSERS' position is a change in policy—in fact, it appears that the question of whether schools that expel disabled students for reasons unrelated to their disability must continue to provide services, had not been considered before May 1989. In May, a Maryland education official raised the question, and OSERS responded in an unpublished letter that states must continue to provide some form of services. *See* Appellants' Brief at 7. Because there was no published policy, Frank New asked OSERS about the issue when it arose in Ohio.

The School District points to a Memorandum issued by the Office of Special Education Programs (a division of OSERS), to support its argument that the agency's position is a change in policy. *See* Appellees' Brief at 28 (citing Memorandum 87-21, 202 EHLR (Education for the Handicapped Law Report) 372 (June 29, 1987)). The Memorandum lists and answers questions about the Act posed by state special education directors. The School District asserts that the following question and answer state a

policy contrary to that announced in the letter to Frank New:

> Q. What are the issues and requirements related to suspension and expulsion?
>
> A. This is a complex area in which we are currently better able to articulate the issues than the answers. It is also relevant that the Supreme Court has decided to hear a case involving suspension and expulsion. Supreme Court review was requested by Superintendent Honig of California, and will take place some time after October 1, 1987.
>
> OSEP's position is that a suspension or expulsion of more than ten days' duration constitutes a change in placement which would trigger the procedures and protections of the EHA-B. . . . Some courts looking at the discipline issue under both EHA-B and Section 504 [of the Rehabilitation Act of 1973] have said that, when the misbehavior is unrelated to the handicapping condition, the child can be disciplined without regard to the fact that the child has a handicap. This is of interest because the basis for this under the EHA-B is not entirely clear. While this may deserve further thought, OSEP will not apply a rule or guideline contrary to this in the absence of a generally applicable statement distributed in advance to the states.

Memorandum 87-21, 202 EHLR at 374, question 8. But this response only discusses whether a school can suspend or expel a disabled student (for reasons unrelated to his disability), not whether some educational services must be provided once the student is expelled. As counsel for the Department pointed out at oral argument, until recently it was unclear whether disabled children could be disciplined at all under the Act. *Honig v. Doe* resolved this question in the affirmative. 484 U.S. 305 (1988). The Memorandum does not support the position that the letter announced a change in longstanding agency policy.

In this case, the treatment of children expelled for reasons unrelated to their disabilities has never arisen. Under the plaintiffs' reasoning, any expression of agency opinion on the subject necessarily would be new and, therefore, legislative. This line of reasoning was rejected implicitly in *American Postal Workers*, 707 F.2d at 558. In that case, the Postal Service changed the computation formula for retirement benefits for its workers. The change in the formula reduced the expected benefits of 113,000 future retirees. *Id.* at 549. Notwithstanding the "newness" of the rule, the court found that the new rule met the "classic definition of an interpretive rule" because it "merely interpreted the term 'average pay' as applied to PTF's [part-time flexible employees] to include only pay actually earned." *Id.* at 559.

Similarly, in *Thomas*, the Environmental Protection Agency refused to accept Michigan's proposed fugitive dust regulations although they were nearly identical to regulations approved five years before. 805 F.2d at 180-81. After it approved the earlier regulations, the EPA modified its definition of "reasonably available control technology ("RACT")." *Id.* at 180. EPA informed the state that it should use the more rigorous definition of RACT. It stated that new information and "increased Agency concern that rules be specific" meant that it might not approve Michigan's proposed rules. *Id.* at 181. This was so even though the statute being interpreted, Part D of the Clean Air Act, 42 U.S.C. § 7502(b)(3), remained unchanged. The Sixth Circuit held that the EPA's revised definition of "reasonably available control technology," which required more detail than the old one, was interpretive. *Id.* at 183. The "definition clearly harmonizes with the language and purpose of . . . the Clean Air Act . . . and does not create any new law, rights or duties." *Id.* (quotations omitted).

These cases show that an agency's change in its reading of a statute does not necessarily make the rule announcing the change legislative. That rules "may have altered administrative duties or other hardships does not make them substantive [legislative]." *Alcarez v. Block*, 746 F.2d

543, 613 (9th Cir. 1983). Further, as we have pointed out, the issue here is a new one, and the agency's ruling does not constitute a change in policy.

The rule announced in Davila's letter satisfies the general test of an interpretive rule. It relies upon the language of the statute and its legislative history to determine "that Congress did not intend for educational services to cease for children with handicaps who were removed from schools as a result of behavioral problems." Davila Letter at 3, Appellants' Appendix at 19. This represents the paradigmatic case of an interpretive rule. *See United Technologies*, 821 F.2d at 718. OSERS has simply stated what it thinks the IDEA-B requires. *See id.*; *Production Tool*, 688 F.2d at 1165-67. *See also American Hospital Association v. Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987) (interpretive rules "merely explicat[e] Congress' desires"). The rule is based on specific statutory provisions ("all handicapped children"), and its validity stands or falls on the correctness of the agency's interpretation of the statute. In these circumstances, it is clear that the rule is an interpretive one. *See United Technologies*, 821 F.2d at 719-20.

At oral argument, counsel for the School District asserted that Davila's letter to New constituted a legislative rule for three reasons: the Department of Education has delegated law-making authority from Congress; Davila's interpretation is mandatory and binding; and it is a new rule. Unfortunately for the School District, these factors do not control the determination of whether an agency has promulgated a legislative or interpretive rule. We already have discussed and rejected the contention that "new" rules are always legislative. The remaining arguments are also without merit.

Simply because an agency has the power to enact legislative rules does not mean that it has exercised that power. As we have noted, all agencies with power to administer statutes also have the authority to interpret them. *See discussion supra* at 10. If the mere delegation of rule-making authority meant all subsequent agency de-

terminations were legislative, and had to meet the notice and comment requirements of the APA, agency functioning would be hamstrung. The ability to issue interpretive rules "preserve[s] agency flexibility" and "allow[s] agencies to explain ambiguous terms in legislative enactments without having to undertake cumbersome proceedings." *American Hospital Association v. Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987). *See, e.g., United Technologies*, 821 F.2d at 714 (EPA has both rule-making authority, yet issued interpretive rule); *American Trucking Association*, 688 F.2d at 1337 (Interstate Commerce Commission has both, issued interpretive rules); *Energy Reserves Group, Inc. v. Department of Energy*, 589 F.2d 1082 (Temp. Emer. Ct. App. 1978) (Federal Energy Administration has both, issued interpretive rules).

The second factor the School District relied upon at oral argument similarly is flawed. All rules which interpret the underlying statute must be binding because they set forth what the agency believes is congressional intent. Could an agency announce, "We think Congress intended this when it enacted this statute, but you don't have to do it."? Courts are not bound by an agency's interpretation, as we have discussed *supra*, but parties regulated by the statute certainly are. *Alcarez*, 746 F.2d at 614. The court in *Alcarez* rejected the plaintiff's argument that a binding rule is necessarily a legislative one. *Id.* "[A]ll rules are 'binding' on the regulated parties in the sense that they set, for the time, the legal minima of behavioral standards. The extent to which regulations are 'binding' in comparison to one another, however, is only an effect of the distinction between substantive and interpretive rules, not a criterion of the distinction." *Id.* As we discussed, the nature of the rule dictates the degree of deference it receives from a reviewing court.

Further, as we pointed out in *Production Tool*, "a rule affecting rights and obligations is [not] *ipso facto* legislative." 688 F.2d at 1166. *See also American Postal Workers*, 707 F.2d at 559 (conclusive change in benefits calculation formula is interpretive). "The fact that *burdens* were im-

posed on . . . plaintiffs only goes to the substantial impact of the statute and the regulations, not whether the regulations created law." *Alcarez*, 746 F.2d at 613. "[P]enalizing the agency for explaining what was for the plaintiffs bad news about [the IDEA], by labeling the explanation 'substantive,' would be like killing the messenger." *Id.* at 614. Davila's letter simply explained what the statute already requires.

Prevailing authority rejects the proposition that a rule that has substantial impact is necessarily legislative. *Friedrich v. Secretary of Health & Human Services*, 894 F.2d 829, 836 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 59 (1990); *Industrial Safety Equipment Association, Inc. v. EPA*, 837 F.2d 1115, 1121 (D.C. Cir. 1988); *American Postal Workers Union v. United States Postal Service*, 707 F.2d 548, 560 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1100 (1985). The district court relied in part upon this rationale to find that Davila's letter announced a legislative rule. "[T]he impact of a rule has no bearing on whether it is legislative or interpretative; interpretative rules may have a substantial impact on the rights of individuals." *Id.* at 560. The district court's reliance upon this rationale thus is misplaced.

The district court also found Davila's interpretation of the IDEA was a legislative rule because it found that continuing services are "not expressly required" by the Act. But this rationale again implicitly rejects OSERS' inherent authority to interpret its governing statute. If the IDEA expressly required services to continue after expulsion, there would be no need for OSERS to interpret congressional intent on the subject.

The district court's final reason for holding that OSERS' interpretation of the IDEA was a legislative rather than interpretive rule also misconceives the governing test. The court did not approve of the agency's interpretation of *Honig v. Doe*.

> If the Supreme Court's opinion in *Honig* means what the defendant seems to think it means, i.e., that the

> Act indeed requires what his letter mandates, then the letter could perhaps be construed a interpretive.

770 F. Supp. at 1338. In other words, because the district court disagreed with OSERS' interpretation of *Honig* and the statute, the interpretation must be legislative, and thus in violation of the APA. The School District also raises this argument on appeal—because *Honig* does not dictate OSERS' interpretation, that 'interpretation' must be legislative. *Honig* did not reach this issue—it noted that students could be suspended for behavior related to their disability that poses an immediate threat to others. 484 U.S. at 325. But OSERS' letter did not contend that *Honig* resolved the issue. The district court seems to hold that because *Honig* did not offer the interpretation adopted by OSERS, the interpretation must be legislative. This reasoning is in error. Simply because a reviewing court disagrees with an agency interpretation does not render it legislative. An agency has "inherent authority to issue interpretive rules informing the public of the . . . standards it intends to apply in exercising its discretion." *Production Tool*, 688 F.2d at 1166. Further, the School District has only challenged the OSERS' authority to issue its interpretation, not the interpretation itself. Of course, if the school district were entirely happy with OSERS' reading of IDEA-B, this case would not be before us. Nevertheless, a reviewing court's disagreement with the substance of an agency's interpretive rule does not render the interpretive rule legislative.

Finally, we do not believe that the provision of the IDEA that delegates rulemaking authority to the Department of Education, 20 U.S.C. § 1417(b), requires OSERS to promulgate its interpretation of the Act through notice and comment. *See* 770 F. Supp. at 1337. This section was designed to ensure that the rules necessary to implement the Act would be in place early enough to allow states to fulfill their statutory obligations by the effective date of the Act. *See* Appellants' Brief at 5-6. Moreover, as we have discussed, a grant of legislative authority (and the agency's exercise of that authority) does not remove the

agency's inherent authority to issue interpretive rules. The School District fundamentally misapprehends § 1417(b), as well as the agency's inherent rulemaking authority. This delegation authorizes legislative rulemaking, it does not revoke interpretive authority.

III.

For the foregoing reasons, the decision of the district court is REVERSED, and the case is REMANDED for entry of summary judgment in favor of Davila and the Department of Education.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA AO7XXXC-92-001—Midwest Law Printing Co., Inc., Chicago—7-30-92

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

METROPOLITAN SCHOOL DISTRICT OF WAYNE TOWNSHIP, MARION COUNTY, INDIANA, on behalf of itself, and all others similarly situated,	)	
Plaintiff,	)	CIVIL ACTION NO. IP 90-1435-C
v.	)	
ROBERT R. DAVILA, ASSISTANT SECRETARY, OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES, UNITED STATES DEPARTMENT OF EDUCATION,	)	
Defendant.	)	

DILLIN, District Judge.

August 13, 1991

This matter comes before the Court on Defendant Robert R. Davila's motion to dismiss, Plaintiff Metropolitan School District of Wayne Township's motion for summary judgment, and on Defendant Robert R. Davila's cross motion for summary judgment. For the following reasons, Robert R. Davila's motion

to dismiss is denied, Metropolitan School District of Wayne Township's motion for summary judgment is granted, and Robert R. Davila's cross motion for summary judgment is denied.

BACKGROUND

Plaintiff Metropolitan School District of Wayne Township, Marion County (School District), is a local school in the State of Indiana. Plaintiff's action has been certified as a class action pursuant to rule 23(b)(2), Fed.R.Civ.P. The class consists of all public school corporations in the State of Indiana. The School District and the plaintiff's class receive funding under part B of the Education of the Handicapped Act (EHA-B), 20 U.S.C. §§ 1401-85. Under EHA-B, the federal government provides funds to individual states, which then distribute the funds to local school districts to provide educational services to handicapped children. To be eligible for funding, EHA-B requires that states have in effect a policy that assures a free appropriate education (FAPE) to all handicapped children. 20 U.S.C. § 1412(1).

The Office of Special Education and Rehabilitative Services (OSERS), United States Department of Education, is the agency in charge of EHA-B administration. Prior to September 15, 1989, there was no OSERS requirement of any kind that educational services must be provided to handicapped students during periods of expulsion or suspension not casually related to the student's handicap. The School District did not continue education services to such expelled students, nor was it required to do so by the State of Indiana as a condition of obtaining EHA-B funds.

Defendant Robert Davila (Davila) is the Assistant Secretary in charge of OSERS. On September 15, 1989, Davila authored a letter to Frank E. New (New Letter) of the Ohio Department of Education. In the New Letter, OSERS, through Davila, expressed its view that the statutory requirement that a FAPE be

provided to "all" handicapped children, applies to handicapped children during periods of long-term suspension or expulsion resulting from misbehavior that is not a manifestation of the child's handicap.

The New Letter was not published in the Federal Register or the Code of Federal Regulations. It was, however, made available for general publication in the Education for the Handicapped Law Report (EHLR). Paul Ash, Director of Special Education, Indiana Department of Education (Ash), initially read the letter in the EHLR and, based upon the letter, now requires the School District, and the plaintiff's class, to continue services in Indiana for expelled or suspended handicapped children. The School District estimates that the additional cost to it alone to comply with this requirement, based upon previous years expulsion figures, is $100,000 to $300,000 per year.

The present litigation arises out of the School District's complaint filed June 8, 1990. In its complaint, the School District alleges that Davila, through the New Letter, has promulgated a legislative rule without following the public notice and comment procedures mandated by the Administrative Procedure Act (APA), 5 U.S.C. § 553. Davila, and OSERS, contend that the New Letter is an interpretation of EHA-B, and, as such, is not subject to the notice and comment requirements of the APA.

DISCUSSION

Davila has moved this Court for an Order dismissing the School District's complaint. Both parties have also filed motions for summary judgment. As the motion to dismiss is potentially dispositive, judicial economy requires that it be considered first.

Motion to Dismiss

In support of his motion, Davila raises four grounds for dismissal: [1] this Court lacks personal jurisidiction over Davila in his individual capacity; [2] the school district has not stated

a claim against Davila in his individual capacity for which relief can be granted; [3] the school district lacks standing to bring this action; and [4] this action is not ripe for review.

Davila's first and second grounds for dismissal relate to the School District's claims against Davila in his individual capacity. However, the School District has stated that because of "the urgency of this matter . . .and the fact that this dispute goes to form rather than substance, plaintiff is willing to proceed at this stage against defendant in his official capacity to avoid any further procedural delays." In light of this statement, the Court grants the School District's request to amend its complaint by interlineation in order to make clear that this action is against Davila only in his official capacity. This being so, the Court finds that Davila's first two grounds for dismissal are denied as moot.

Davila's third ground for dismissal is that the School District lacks standing. To have "standing" means that the party bringing suit has a sufficient stake to obtain judicial resolution of that controversy. *Sierra Club v. Morton*, 405 U.S. 727, 731, 92 S.Ct. 1361, 1364, 31 L.Ed.2d 636, 641 (1972). The Supreme Court has set forth three elements that the School District must satisfy to have standing: (1) the Plaintiff "personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant"; (2) the injury "fairly can be traced to the challenged action" of the defendants; and (3) the injury "is likely to be redressed" by a favorable decision. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472, 102 S.Ct. 752, 758, 70 L.Ed.2d 700, 709 (1982).

Davila first contends that the School District has not suffered a sufficient actual or threatened injury. In support, Davila asserts that any injury threatened to the School District is speculative. Davila argues that the threatened injury is speculative for the following reasons: it is not certain that there will be expulsions of handicapped children from the school; the state

has not yet approved an EHA-B plan requiring expenditures for expelled children; Indiana itself, as opposed to the School District, may opt to provide the out-of-school services; and, the School District could seek redress through administrative processes which might eliminate the injury.

The School District states that its injury in the present action is the application of an illegal governmental decision by a governmental official under color of law. *See Black & Decker Corp. v. American Standard, Inc.*, 679 F.Supp. 1183, 1190 (D.Del.1988)("the actual or threatened 'injury' from which Plaintiffs suffer is that Plaintiffs are subject to the requirements of an allegedly unconstitutionally statute"). Specifically, the School District contends that application of the New Letter will require the School District to spend between $100,000 and $300,000, and force it to acquire additional personnel in the coming school year.

In support of its contention that this injury is not too speculative, the School District has adduced proof that Indiana's Final State Plan for fiscal years 1991-93 requires services to be continued for students who have been suspended or expelled for reasons not casually related to their handicaps. According to Ash, this is a change in the Indiana Plan, dictated by the New Letter and rulings of OSERS pursuant thereto.

Finally, the School District relies on the affidavit of Dr. Edward Bowes (Bowes), the Superintendent of the School District since 1978. Bowes states that during the 1989-90 school year 18 handicapped students were expelled for non-handicapped-related reasons, and that there is no reason not to expect similar actions in the future.

The Court finds that the School District has stated a sufficient threatened injury, and that the testimony of Ash, combined with the affidavit of Bowes, shows that the injury is not so speculative as to defeat the School District's standing. In

addition, the Court has not been persuaded that there is administrative review which could redress the School District's charge that Davila exceeded his statutory authority.

Davila next asserts that even if the School District has stated a threatened injury, it has not shown that this injury can be traced to Davila's actions. In support, Davila vaguely argues that the School District's injury cannot be traced to him because the State of Indiana may have been able to arrive at Davila's position expressed in the New Letter independently. *See Von Aulock v. Smith*, 720 F.2d 176, 181 (D.C.Cir.1983)(in regard to standing, "the indirectness of the injury . . . may make it more difficult to meet the minimum requirement of Article III").

In opposition, the School District argues that Ash's deposition disposes of the traceability issue. As Davila contends, Ash does state that before the New Letter was issued the Indiana Department of Education's legal department may have taken various positions regarding the issue considered in the New Letter. However, Ash also states that based upon the New Letter, he believes continued services are now required, where before they were not.

The Court finds that the School District's threatened injury is traceable to the New Letter, and consequently the actions of Davila. Thus, Davila's motion to dismiss fails on this issue.

Davila argues that the "appropriate relief if plaintiff is successful is to enjoin Dr. Davila from issuing letters, not to enjoin him from interpreting EHA-B in his official capacity." However, the "appropriate relief" stated by Davila is precisely what the School District seeks.

In its complaint, the School District has asked for an injunction enjoining Davila from "taking any action in Indiana to enforce his position as evidenced in the New Letter . . ." In its briefs the School District has repeatedly argued that "the ultimate correctness of defendant's position on continued services" is neither contested nor essential to the Court's analysis.

The School District's briefs, coupled with the relief sought in its complaint, makes it clear that the School District is not, as Davila contends, seeking to enjoin him from issuing interpretive letters in his official capacity. Rather the School District is seeking to enjoin Davila's position taken in the New Letter from being enforced until the APA's notice and comment requirements have been satisfied, on the theory that the Letter is not merely interpretive but is, in fact, legislative.

The Court finds that a favorable decision on the merits of the case would grant the relief sought by the School District. As the School District has also stated a threatened injury traceable to Davila, the Court holds that the School District has standing to bring this suit. Consequently, Davila's motion to dismiss on the issue of standing must be denied.

Davila's fourth, and final, ground for dismissal is that this cause is not ripe for decision. The doctrine of ripeness involves the question of whether there is a substantial controversy of sufficient immediacy and reality to warrant the issuance of a judgment. *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 92 S.Ct. 1749, 32 L.Ed.2d 257 (1972). "The problem [of ripeness] is best seen in a two fold aspect requiring us to evaluate both the fitness of the issue for judicial resolution and the hardship to the parties withholding consideration." *Abbott Laboratories v. Gardner*, 387 US. 136, 149, 87 S.Ct. 1507, 1515, 18 L.Ed.2d 681, 691 (1967).

First to consider is the fitness of the issue for judicial consideration. The School District has framed the issued tendered in this action as "[w]hether defendant exceeded his statutory grant of authority in issuing the New Letter on September 15, 1989, . . ." Davila admits that this is a "purely legal dispute" and that such issues are often appropriate for review. However, citing *Toilet Goods Association v. Gardner*, 387 U.S. 158, 162-64, 87 S.Ct. 1520, 1523-24, 18 L.Ed.2d 697, 701-02 (1967), Davila argues that "even a dispute as to authority

is not ripe where the factual context of enforcement proceedings will improve the ability of the Court to determine the propriety for the rule or interpretation."

Davila asserts that "the letter does not specify the extent to which services must be provided, that is, whether fewer services than would be provided were the handicapped child in school, is 'appropriate' [FAPE] under those circumstances." This being so, Davila argues that this Court would be better prepared to "determine the appropriateness of and authority for the interpretation contained in the New Letter, when presented with a concrete enforcement context." The Court does not agree.

Toilet Goods, Davila's principal authority, "involved a challenge by manufacturers to an FDA regulation permitting the FDA Commissioner to suspend certification if FDA inspectors were refused access to manufacturing facilities and certain records." *Sierra Club v. Yeutter*, 911 F.2d 1405, 1415 (10th Cir.1990). The issue presented was whether the above regulation was properly issued within the statutory authority to promulgate regulations "for the efficient enforcement" of the FDA act. The Court found this issue purely legal, but held that this issue was not ripe for judicial resolution.

Considering the FDA's authority under the "efficient enforcement" provision, the Supreme Court stated:

> This [issue] will depend not merely on an inquiry into statutory purpose, but concurrently on an understanding of what types of enforcement problems are encountered by the FDA . . . We believe that judicial appraisal of these factors is likely to stand on a much surer footing in the context of a specific allegation of this regulation than could be the case in the framework of the generalized challenge made here.

Toilet Goods, 387 U.S. at 163-64, 87 S.Ct. at 1524, 18 L.Ed.2d at 701-02.

The Court finds that the issue presented for judicial consideration by the School District would not be aided by a challenge arising under a specific situation. Unlike the issue in *Toilet Goods*, the issue in the present action is whether the New Letter states legislative law requiring notice and comment under the APA, or is an interpretation which does not. The resolution of this issue does not depend on factors outside the APA and EHA-B. The School District is not questioning the substantive validity of the New Letter at this time; it questions the manner in which it was promulgated. Accordingly, the Court holds that the issue tendered in this action is appropriate for judicial resolution.

The second consideration under the doctrine of ripeness is the hardship to the parties if consideration is withheld. Davila argues that there is no advance action required by the School District because the need for providing homebound services will arise only in future specific situations. Hence no hardship to the School District will result if this action is delayed.

The School District counters that there is indeed hardship: "plaintiff must begin the school year in less than three (3) weeks with at least a $100,000 budgetary shortfall because Indiana requires compliance with the defendant's position; plaintiff must also locate and contract for additional teacher services." Although the quoted words were made with respect to the 1990-91 school year, the same situation exists at this time with respect to the 1991-92 year. Further, the School District argues that to "test Indiana regulation at the expense of one child in the name of administrative review and ripeness . . .not only needlessly involves the student, but wastes public funds and resources to challenge defendant's actions. . . ." The Court agrees.

The Court finds that the School District is threatened with a concrete hardship that has an immediate impact on its day to day affairs. Thus, this matter is ripe for judicial review. *Natural Resources Defense Council v. Thomas*, 845 F.2d 1088, 1093 (D.C.Cir.1988); *see Koehring Co. v. Adams*, 605 F.2d 280, 282-83 (7th Cir.1979); *U.S. v. Zimmer Paper Products, Inc.*, 733 F.Supp. 1265 (S.D.Ind.1989)(defendant's forced choice to either install incinerator, which defendant believes not required or to incur fines, was sufficient to show claim ripe for review). For all of the above reasons, Davila's motion to dismiss is denied.

Summary Judgment

Summary judgment, pursuant to Rule 56, F.R.Civ.P., is proper only when there is no genuine issue of material fact. *Big O Tire Dealers, Inc. v. Big O Warehouse*, 741 F.2d 160, 163 (7th Cir.1984). The facts in this action are not in dispute. The position taken by Davila in the New Letter has not been published in the Federal Register or Code of Federal Regulations, nor were comments taken prior to its being issued. Both parties agree that the issue is whether, as the School District asserts, the New Letter is a "legislative rule" requiring notice and comment under the APA, or, as Davila contends, merely an "interpretive rule" exempt from the APA's requirements.

"An interpretative rule expresses the agency's view of what another rule, regulation or statute means." *Allied Van Lines, Inc. v. Interstate Commerce Commission*, 708 F.2d 297, 300 (7th Cir.1983) (citing *Pacific Gas & Electric Co. v. Federal Power Commission*, 506 F.2d 33, 37 n. 14 (D.C.Cir.1974)). It advises the public of an agency's construction of regulations that it administers. *American Medical Ass'n v. Heckler*, 606 F.Supp. 1422, 1439 (S.D.Ind.1985) "An interpretive rule simply states that the administrative agency thinks the statute means, and only reminds affected parties of existing duties." *Id.* (quoting *General Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C.Cir.1984)).

In contrast to the interpretive rule, a "legislative rule is issued by an agency pursuant to statutory authority implementing the statute and 'has the force and effect of law.'" *American Medical Ass'n*, 606 F.Supp. at 1439 (citing *Batterton v. Francis*, 432 U.S. 416, 425 & n. 9, 97 S.Ct. 2399, 2405-06, 53 L.Ed.2d 448 (1977)). Legislative rules are those which create law, usually implementary to an existing law. *Gibson Wine Co. v. Snyder*, 194 F.2d 329, 331 (D.C.Cir.1952). The "common understanding [is] that legislative rules usually involve matters within agency expertise, which expertise notice and comment procedures are intended to sharpen." *Allied Van Lines*, 708 F.2d at 300.

Having examined the New Letter, the Court finds that it is best considered a legislative rule. On its face, the New Letter purports to be merely Davila's opinion of the meaning of 20 U.S.C. § 1412(1), but its effect is to change a long standing policy of OSERS without a corresponding change in the underlying statute or regulations.

The authority of the Secretary of Education, Davila's superior, is set out in 20 U.S.C. § 1417(b) as follows:

> In carrying out the provisions of this subchapter, the Secretary shall issue, not later than January 1, 1977, amend, and revoke such rules and regulations as may be necessary. *No other less formal method of implementing such provisions is authorized.* (our emphasis).

Implicit in this provision is the requirement that proposed rules be published in the Federal Register with an opportunity for comment by interested persons prior to a rule taking effect. 5 U.S.C. § 553. Pursuant to the power granted to the Secretary, some 425 pages of rules and regulations have been enacted, occupying an entire volume of the Code of Federal Regulations (CFR), 34 CFR parts 300-399 (July 1, 1990).

The New Letter is obviously a substantive rule or regulation in that (1) it imposes a new and mandatory duty upon all school districts in the United States, (2) the new duty is not expressly required by EHA, and (3) contrary to the New Letter itself it is not required by *Honig v. Doe*, 484 U.S. 305, 108 S.Ct. 592, 98 L.Ed.2d 686 (1988).

Substantive rules implement a statute or rule, and grant rights, impose obligations, or produce other significant effects on private interests. *National Treasury Employees Union v. Reagan*, 685 F.Supp. 1346 (E.D.La.1985). The New Letter and its requirements are clearly intended to be binding on plaintiff, plaintiff's class, and all states by the letter itself (" . . . [s]tates receiving EHA-B funds are statutorily obligated . . ."), and by the defendant's response to plaintiff's second set of interrogatories. It therefore purports to create law implementary to an existing law, and qualifies as a substantive rule under the above definition. *See Gibson Wine Co. v. Snyder*, 194 F.2d 329 (D.C.Cir.1952).

If the Supreme Court's opinion in *Honig* means what the defendant seems to think it means, i.e., that the Act indeed requires what his letter mandates, then the letter could perhaps be construed as interpretive. However, *Honig* does not deal with the situation in which a child has been suspended or expelled by conduct having no relation to his disability, but rather to the situation in which the conduct arises out of the disability itself. *Honig* affirms the decision of the Ninth Circuit Court of Appeals rendered in *Doe by Gonzales v. Maher*, 793 F.2d 1470 (1986) in all but one detail not here material. The key portion of the underlying *Maher* decision, in so far as the present controversy is concerned, is exactly contra the New Letter, and reads as follows:

> We do not hold, however, that a school district may never withhold educational services from a handicapped child. If the child's behavior is properly determined *not* to be a manifestation of his handicap [footnote omitted], the handicapped child can be expelled. *See Kaelin v. Grubbs*, 682 F.2d 595, 602 (6th Cir.1982); *S-1 v. Turlington*, 635 F.2d 342, 248 (5th Cir.)(Unit B), *cert. denied*, 454 U.S. 1030, 102 S.Ct. 566, 70 L.Ed.2d 473 (1981); *Doe v. Koger*, 480 F.Supp. 225, 228 (N.D.Ind.1979). This conclusion does not conflict with the EAHCA. When a child's misbehavior does not result from his handicapping condition, there is simply no justification for exempting him from the rules, including those regarding expulsion, applicable to other children. Therefore, when a handicapped child is properly expelled, the school district may cease providing all educational services-just as it could in any other case. To do otherwise would amount to asserting that all acts off a handicapped child, both good and bad, are fairly attributable to his handicap. We know that this is not so.

793 F.2d at 1482.

The Court therefore holds that in his New Letter the defendant attempted to enact an administrative rule in a manner contrary to 5 U.S.C. § 553 and 20 U.S.C. § 1417(b), and that such action is contrary to law. Plaintiff's motion for summary judgment is granted, and that of the defendant is denied. Judgment will be entered accordingly.

JUDGMENT

The Court having this day filed its entry granting the motion of the plaintiff for summary judgment, which entry reads as follows: (H.I.), now in accordance therewith

IT IS CONSIDERED AND ORDERED that the defendant, Robert R. Davila, in his official capacity, be and he is hereby enjoined from taking any action in Indiana to enforce his position as set out in the New Letter as to plaintiff, or members of its class, or the State of Indiana.

IT IS FURTHER CONSIDERED AND ORDERED that said defendant be, and he is hereby enjoined from taking any action in Indiana against any agency of the State or public school corporation within the State which would require the continuance of educational services to an eligible child under the Education of the Handicapped Act during periods of long-term suspension or expulsion not casually related to that child's handicap.

IT IS FINALLY CONSIDERED AND ORDERED that the defendant pay the costs of this action.

5 U.S.C. § 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved -

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include -

(1) a statement of time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply -

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are *impracticable, unnecessary, or contrary to the* public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title shall apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except -

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; and

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

20 U.S.C. § 1412. Eligibility requirements

In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Secretary that the following conditions are met:

(1) The State has in effect a policy that assures all handicapped children the right to a free appropriate public education.

(2) The State has developed a plan pursuant to section 1413(b) of this title in effect prior to November 29, 1975, and submitted not later than August 21, 1975, which will be amended so as to comply with the provisions of this paragraph. Each such amended plan shall set forth in detail the policies and procedures which the State will undertake or has undertaken in order to assure that -

(A) there is established (i) a goal of providing full educational opportunity to all handicapped children, (ii) a detailed timetable for accomplishing such a goal, and (iii) a description of the kind and number of facilities, personnel, and services necessary throughout the State to meet such a goal;

(B) a free appropriate public education will be available for all handicapped children between the ages of three and eighteen within the State not later than September 1, 1978, and for all handicapped children between the ages of three and twenty-one within the State not later than September 1, 1989, except that, with respect to handicapped children aged three to five and aged eighteen to twenty-one, inclusive, the requirements of this clause shall not be applied in any State if the application of such requirements would be

inconsistent with State law or practice, or the order of any court, respecting public education within such age groups in the State;

(C) all children residing in the State who are handicapped, regardless of the severity of their handicap, and who are in need of special education and related services are identified, located, and evaluated, and that a practical method is developed and implemented to determine which children are currently receiving needed special education and related services and which children are not currently receiving needed special education and related services;

(D) policies and procedures are established in accordance with detailed criteria prescribed under section 1417(c) of this title; and

(E) any amendment to the plan submitted by the State required by this section shall be available to parents, guardians, and other members of the general public at least thirty days prior to the date of submission of the amendment to the Secretary.

(3) The State has established priorities for providing a free appropriate public education to all handicapped children, which priorities shall meet the timetables set forth in clause (B) of paragraph (2) of this section, first with respect to handicapped children who are not receiving an education, and second with respect to handicapped children, within each disability, with the most severe handicaps who are receiving an inadequate education, and has made adequate progress in meeting the timetables set forth in clause (B) of paragraph (2) of this section.

(4) Each local educational agency in the State will maintain records of the individualized education program for each handicapped child, and such program shall be established, reviewed, and revised as provided in section 1414(a)(5) of this title.

(5) The State has established (A) procedural safeguards as required by section 1415 of this title, (B) procedures to assure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily, and (C) procedures to assure that testing and evaluation materials and procedures utilized for the purposes of evaluation and placement of handicapped children will be selected and administered so as not to be racially or culturally discriminatory. Such materials or procedures shall be provided and administered in the child's native language or mode of communication, unless it clearly is not feasible to do so, and no single procedure shall be the sole criterion for determining an appropriate educational program for a child.

(6) The State educational agency shall be responsible for assuring that the requirements of this subchapter are carried out and that all educational programs for handicapped children within the State, including all such programs administered by any other State or local agency, will be under the general supervision of the persons responsible for educational programs for handicapped children in the State educational agency and shall meet education standards of the State educational agency. This paragraph shall not be construed to limit the responsibility of agencies other than educational agencies in a State from

providing or paying for some or all of the costs of a free appropriate public education to be provided handicapped children in the State.

(7) The State shall assure that (A) in carrying out the requirements of this section procedures are established for consultation with individuals involved in or concerned with the education of handicapped children, including handicapped individuals and parents or guardians of handicapped children, and (B) there are public hearings, adequate notice of such hearings, and an opportunity for comment available to the general public prior to adoption of the policies, programs, and procedures required pursuant to the provisions of this section and section 1413 of this title.

20 U.S.C. § 1417. Administration

(a) Duties of Secretary

(1) In carrying out the Secretary's duties under this subchapter, the Secretary shall -

(A) cooperate with, and furnish all technical assistance necessary, directly or by grant or contract, to the States in matters relating to the education of handicapped children and the execution of the provisions of this subchapter;

(B) provide such short-term training programs and institutes as are necessary;

(C) disseminate information, and otherwise promote the education of all handicapped children within the States; and

(D) assure that each State shall, within one year after November 29, 1975 and every year thereafter, provide certification of the actual number of handicapped children receiving special education and related services in such State.

(2) As soon as practicable after November 29, 1975, the Secretary shall, by regulation, prescribe a uniform financial report to be utilized by State educational agencies in submitting State plans under this subchapter in order to assure equity among the States.

(b) Rules and regulations

In carrying out the provisions of this subchapter, the Secretary shall issue, not later than January 1, 1977, amend, and revoke such rules and regulations as may be necessary. No other less formal method of implementing such provisions is authorized.

(c) Protection of rights and privacy of parents and students

The Secretary shall take appropriate action, in accordance with the provisions of section 1232g of this title, to assure the protection of the confidentiality of any personally identifiable data, information, and records collected or maintained by the Secretary and by State and local educational agencies pursuant to the provisions of this subchapter.

(d) Hiring of qualified personnel

The Secretary is authorized to hire qualified personnel necessary to conduct data collection and evaluation activities required by subsections (b), (c) and (d) of section 1418 of this title and to carry out the Secretary's duties under subsection

(a)(1) of this section without regard to the provisions of Title 5 relating to appointments in the competitive service and without regard to chapter 51 and subchapter III of chapter 53 of such title relating to classification and general schedule pay rates except that no more than twenty such personnel shall be employed at any time.

September 15, 1989

Mr. Frank E. New, Director
Division of Special Education
Department of Education
State of Ohio
933 High Street
Worthington, Ohio 43085-4087

Dear Mr. New:

Thank you for your letter to the Office of Special Education Programs (OSEP), concerning the application of State suspension and expulsion policies under Part B of the Education of the Handicapped Act (EHA-B). Because your inquiry raised complex legal and policy issues, additional time was needed to respond. We apologize for any inconvenience that this delay may have caused you or your staff.

Specifically, you asked if it would be permissible, under both Section 504 of the Rehabilitation Act of 1973 (Section 504) and EHA-B, to exclude a child who is handicapped and cease educational services to that child if it is determined that the child's misconduct is not a result of the child's handicapping condition. For the reasons set out below, we conclude that while terminating educational services to a child who is handicapped under these circumstances is permissible under Section 504, it is not permissible under the EHA-B.

Section 504 is a civil rights statute enforced by the Office for Civil Rights (OCR) that prohibits discrimination against any person with handicaps, whereas EHA-B is a statute that establishes a financial assistance program to aid with the special education of eligible students with handicapping conditions. While the EHA-B establishes specific requirements that must be

followed for EHA-B funding, Section 504 prohibits discrimination to be eligible for *all* Federal funding. Simply stated, just because an action is not prohibited by Section 504 prohibition on discrimination does not mean that the action is necessarily permissible under the EHA-B's provisions requiring that each child receive a free appropriate public education.

The EHA-B has been found by the U.S. Supreme Court in its decision in *Honig v. Doe*, 108 S.Ct. 592 (1988), to prohibit State or local school authorities from unilaterally excluding children with handicaps from the classroom for dangerous or disruptive conduct arising from their handicapping condition. However, the Court explained that this ruling does not "leave educators hamstrung" as follows:

> Our conclusion that Sec. 1415(e)(3) means what it says does not leave educators hamstrung. The Department of Education has observed that, '[W]hile the [child's] placement may not be changed [during any complaint proceeding], this does not preclude the agency from using its normal procedures for dealing with children who are endangering themselves or others . . . .' More drastically, where a student poses an immediate threat to the safety of others, officials may temporarily suspend him or her for up to ten school days.
>
> This authority, which respondent in no way disputes, not only ensures that school administrators can protect the safety of others by promptly removing the most dangerous of students, it also provides a 'cooling down' period during which officials can initiate IEP review and seek to

> persuade the child's parents to agree to an interim placement. And in those cases in which the parents of a truly dangerous child adamantly refuse to permit any change in placement, the 10-day respite gives school officials an opportunity to invoke the aid of the courts under § 1415(e)(2), which empowers courts to grant any appropriate relief.

108 S.Ct. at 605.

It is the position of this Office that discipline of a child with a handicap, whether or not the misconduct is related to the child's handicapping condition, must be consistent with the child's right to educational services under the EHA-B. In order for a State to qualify for assistance under the EHA-B, a State must demonstrate that it "has in effect a policy that assures all handicapped children the right to a free appropriate public education." 20 U.S.C. 1412(1); *see also* 34 CFR § 300.121(a). Thus, we conclude that all children with handicaps — including those who have been suspended or expelled — must be provided a free appropriate public education.

This conclusion is also supported by the legislative history of the EHA-B. The EHA-B "followed a series of landmark court cases establishing in law the right to education for all handicapped children." S. REP. NO. 168, 94th Cong., 1st Sess. 6, *reprinted in* 1975 U.S. CODE CONG. & AD. NEWS 1425, 1430. *Mills v. Board of Education of District of Columbia*, 348 F.Supp. 866 (1972), one of the important of these cases, involved the exclusion from educational services of children with handicaps with behavioral problems Congress relied heavily on the *Mills* decision in its deliberations over the EHA-B. *Timothy W. v. Rochester*, 875 F.2d 954, 968 (1st Cir. 1989). The *Mills* Court ordered that:

> No child eligible for a publicly-supported education in the District of Columbia public schools shall be excluded from a regular public school assignment by a rule, policy, or practice of the Board of Education of the District of Columbia or its agents unless such child is provided:
>
> (a) adequate alternative educational services suited to the child's needs, which may include special education or tuition grants and,
>
> (b) a Constitutionally adequate prior hearing and periodic review of the child's status, progress. and the adequacy of any educational alternative. S. REP. NO. 168 at 6.

This supports our conclusion that Congress did not intend for educational services to cease for children with handicaps who were removed from schools as a result of behavioral problems.

In accordance with the above, local school districts in Ohio should be made aware that States receiving EHA-B funds are statutorily obligated to provide eligible children with handicaps with educational services, including during those periods of long-term suspension or expulsion where such disciplinary action results from misbehavior that is not a manifestation of the child's handicap.

We hope you find this information helpful. Please let me know if we can provide additional assistance.

Sincerely,

Robert R. Davila
Assistant Secretary

Supreme Court, U.S.
FILED
JAN 29 1993
OFFICE OF THE CLERK

No. 92-929

In the Supreme Court of the United States

OCTOBER TERM, 1992

METROPOLITAN SCHOOL DISTRICT OF WAYNE TOWNSHIP, MARION COUNTY, INDIANA, ETC., PETITIONER

v.

ROBERT R. DAVILA, ETC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Under the Individuals with Disabilities Education Act, 20 U.S.C. 1400 *et seq.*, participating States are required to assure all children with disabilities a right to a free appropriate public education. The Secretary of Education construes this statutory requirement to include children with disabilities who are subject to long-term suspension or expulsion for behavior that is not related to their disabilities. The question in this case is whether the Secretary's construction of the statute is an interpretive rule exempt from the notice and comment procedures of the Administrative Procedure Act, 5 U.S.C. 553.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-929

METROPOLITAN SCHOOL DISTRICT OF WAYNE TOWNSHIP, MARION COUNTY, INDIANA, ETC., PETITIONER

v.

ROBERT R. DAVILA, ETC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 969 F.2d 485. The opinion of the district court (Pet. App. 17a-30a) is reported at 770 F. Supp. 1331.

JURISDICTION

The judgment of the court of appeals was entered on July 30, 1992. A petition for rehearing was denied on September 1, 1992. Pet. 2. The petition for a writ of certiorari was filed on November 30, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.*, "to assure that all children with disabilities have available to them * * * a free appropriate public education." 20 U.S.C. 1400(c) (Supp. II 1990).[1] In 1975, Congress found that more than half of all children with disabilities were not receiving an adequate education, and that one in eight were excluded entirely from the public school system. 20 U.S.C. 1400(b)(3) and (4) (Supp. II 1990). In many cases, parents were not notified or consulted before children with disabilities were excluded from the classroom. See *Honig* v. *Doe*, 484 U.S. 305, 309-310 (1988).

Under the IDEA, the federal government provides funds to participating States for special education and related services to eligible children with disabilities. Most of the funds are distributed to local educational agencies and intermediate educational units. 20 U.S.C. 1411(c)(1). To be eligible for funding, a State must demonstrate that it "has in effect a policy that assures all children with disabilities the right to a free appropriate public education." 20 U.S.C. 1412(1) (Supp. II 1990). The Act requires participating States to have plans with the goal of providing "full educational opportunity to all children with disabilities" and to make "a free appropriate public education * * * available for all children with disabilities." 20 U.S.C. 1412(2)(A) and (B) (Supp. II 1990). The Act requires the States to develop an individualized education program (IEP) for each child with a disability, 20 U.S.C. 1414(a)(5) (Supp. II 1990), and to establish procedures for parents to challenge their child's IEP and placement, and the educational services provided by the

---

[1] The IDEA formerly was known as the Education of the Handicapped Act.

State. 20 U.S.C. 1412(5)(A) (Supp. II 1990), 1414(a)(7), 1415 (1988 & Supp. II 1990).

The IDEA provides that children with disabilities should be educated with children who are not disabled to the maximum extent appropriate. 20 U.S.C. 1412(5)(B) (Supp. II 1990). But the Act expressly contemplates alternative education outside the classroom, such as home instruction and instruction in hospitals and correctional institutions when such measures are necessary. 20 U.S.C. 1401(16) (Supp. II 1990); 34 C.F.R. 300.2; 57 Fed. Reg. 44,804 (1992) (to be codified at 34 C.F.R. 300.17). See also 20 U.S.C. 1412(5)(B) (Supp. II 1990), 1414(a)(1)(C)(iv) (1988 & Supp. II 1990); 34 C.F.R. 300.550 (public agencies shall ensure that special classes or separate schooling are provided only when the nature and severity of the disability warrants removal from classroom).

2. On September 15, 1989, respondent wrote a letter in response to a question from Frank E. New, an Ohio education official. See Pet. App. 39a-42a (the "New Letter"). The New Letter addressed the question whether Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, and the IDEA permit a State to cease providing educational services to children with disabilities who engage in misconduct that is unrelated to their disabilities. Respondent concluded that terminating educational services to such a child is permissible under Section 504, but not under the IDEA. Respondent explained that "[i]n order for a State to qualify for assistance under the [IDEA], a State must demonstrate that it 'has in effect a policy that assures all * * * children [with disabilities] the right to a free appropriate public education.'" Pet. App. 41a, quoting 20 U.S.C. 1412(1). Respondent noted that Congress enacted the 1975 version of the IDEA "foll w[ing] a series of landmark court cases establishing in law the right to education for all handicapped children," S. Rep. No. 168, 94th Cong., 1st Sess. 6 (1975), and

that one of those cases "involved the exclusion from educational services of children with [disabilities] with behavioral problems." Pet. App. 41a, citing *Mills* v. *Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972). The agency did not solicit public comments before sending the New Letter, and the New Letter was not published in the *Federal Register*.[2]

3. On June 8, 1990, petitioner filed an action in the United States District Court for the Southern District of Indiana, alleging, *inter alia*, that the New Letter constitutes a legislative rule subject to the notice and comment requirements of the Administrative Procedure Act (APA), 5 U.S.C. 553, and that the notice and comment procedure is also required by 20 U.S.C. 1417(b). Pet. App. 19a.

The district court certified a plaintiff class comprising all public school corporations in Indiana, and granted summary judgment for the plaintiffs. Pet. App. 17a-30a. The district court held that the New Letter announced a substantive or legislative rule because (1) it imposed a new and mandatory duty upon all school districts; (2) the IDEA does not expressly require the rule; and (3) this Court's decision in *Honig* v. *Doe*, 484 U.S. 305 (1988), does not require the rule. Pet. App. 28a-30a. The district court further concluded that 20 U.S.C. 1417(b) implicitly requires legislative rules to be published in the *Federal Register* in accordance with the notice and comment procedures of Section 553 of the APA. Pet. App. 27a-29a.

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[2] In May 1989, following a query from a Maryland education official, the agency responded with an unpublished letter expressing the view that, under the IDEA, a State may expel or suspend a student with a disability for misbehavior unrelated to the student's disability, provided that appropriate educational services do not cease. Pet. App. 9a.

4. The court of appeals reversed. Pet. App. 1a-16a. The court concluded that the New Letter announced an interpretive rule and therefore was not subject to the APA's notice and comment requirements. While acknowledging that "[t]he distinction between interpretive * * * and [legislative] rules [was] * * * far from crystal-clear," the court stated that "[t]he 'starting point' of the analysis is the agency's characterization of the rule." Pet. App. 6a, quoting *General Motors Corp.* v. *Ruckleshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (en banc), cert. denied, 471 U.S. 1074 (1985); *United Technologies Corp.* v. *EPA*, 821 F.2d 714, 718 (D.C. Cir. 1987). In general, the court explained:

> An interpret[ive] rule simply states what the administrative agency thinks the [underlying] statute means, and only reminds affected parties of existing duties. On the other hand, if by its action the agency intends to create new law, rights, or duties, the rule is properly considered to be a legislative rule.

Pet. App. 7a, quoting *GMC*, 742 F.2d at 1565. The court of appeals noted that a leading commentator has suggested that "[r]ules are legislative when the agency is exercising delegated power to make law through rules, and rules are interpretative when the agency is not exercising such delegated power." Pet. App. 7a, quoting 2 Kenneth Culp Davis, *Administrative Law Treatise* § 7.10, at 54 (2d ed. 1979). The court observed, however, that Professor Davis's approach "is of limited value" where, as here, the agency "has both delegated rulemaking authority and the power to issue interpretive rules." Pet. App. 8a.

The court concluded that the New Letter "represents the paradigmatic case of an interpretive rule." Pet. App. 12a. The agency "simply stated what it thinks the [statute] requires. * * * The rule is based on specific

statutory provisions * * *, and its validity stands or falls on the correctness of the agency's interpretation of the statute." *Ibid.* The court observed that the New Letter "purports to be [the agency's] interpretation of the IDEA" and uses "the classic tools a reviewing body * * * relies upon to determine the meaning of a statute"—the statutory language, legislative history, prior judicial decisions, and an implementing regulation. Pet. App. 8a. Consequently, the court concluded, the New Letter did not "create[] new law, rights, or duties," but merely "state[d] what [the agency] thinks the statute means." Pet. App. 9a.

The court of appeals expressly rejected the district court's conclusion that the New Letter announced a change in long-standing agency policy. The court of appeals stated (Pet. App. 9a):

> There is nothing in the record to indicate that [the agency's] position is a change in policy—in fact, it appears that the question of whether schools that expel disabled students for reasons unrelated to their disability must continue to provide services, had not been considered before May 1989. In May, a Maryland education[al] official raised the question, and [the agency] responded in an unpublished letter that states must continue to provide some form of services.

In any event, the court explained, "an agency's change in its reading of a statute does not necessarily make the rule announcing the change legislative." Pet. App. 11a.

The court also rejected petitioner's argument that the rule is legislative because Congress has delegated to the agency the authority to promulgate legislative rules. The court observed that "[s]imply because an agency has the power to enact legislative rules does not mean that it has exercised that power" in a particular case. Pet. App.

12a. All agencies that administer statutes have authority to interpret them. The court noted that the authority to issue interpretive rules " 'preserve[s] agency flexibility' and 'allow[s] agencies to explain ambiguous terms in legislative enactments without having to undertake cumbersome proceedings.' " Pet. App. 13a, quoting *American Hosp. Ass'n* v. *Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987).

Next, the court rejected petitioner's contention that the rule is legislative because it is mandatory and binding. The court noted that "[a]ll rules which interpret the * * * statute must be binding because they set forth what the agency believes is congressional intent." Pet. App. 13a. An agency could not announce, "We think Congress intended this when it enacted this statute, but you don't have to do it." *Ibid.* The court noted, however, that interpretive rules, although entitled to judicial deference, are not binding on the courts. Pet. App. 8a. In contrast, legislative rules "have the force and effect of law." *Ibid.*

The court of appeals explained that "[p]revailing authority rejects the proposition that a rule that has substantial impact is necessarily legislative." Pet. App. 14a (citing authorities). Accordingly, the court concluded that "[t]he district court's reliance upon this rationale * * * is misplaced." *Ibid.*

In addition, the court of appeals ruled that the district court erred in ruling that, because this Court's decision in *Honig* v. *Doe* did not adopt the agency's interpretation of the statute, the agency's interpretation must be legislative. *Honig* did not reach the issue in this case. And in any event, the court of appeals noted, "[s]imply because a reviewing court disagrees with an agency interpretation does not render it legislative." Pet. App. 15a.

Finally, the court of appeals rejected the argument that 20 U.S.C. 1417(b) requires the agency to promulgate

its interpretation through notice and comment. The court concluded that Section 1417(b) did not eliminate the agency's inherent authority to interpret the statutes it is charged with administering. Instead, the court concluded that Section 1417(b) ensured timely implementation of major amendments to the Act without cutting short the comment period for legislative rules the agency would promulgate to implement those amendments. Pet. App. 15a-16a.

ARGUMENT

Petitioner renews its contention (Pet. 6-21) that the New Letter announced a legislative rule rather than an interpretive rule, and therefore is subject to the notice and comment requirements of the APA, 5 U.S.C. 553. That issue merits no further review. Although it is not always easy to predict whether a particular rule will be classified as "interpretive" or "legislative," the court of appeals correctly concluded that the rule at issue in this case falls into the interpretive category. There is no basis for petitioner's contention that other courts of appeals would have decided this case differently.[3]

1. In the New Letter, the agency construed 20 U.S.C. 1412(1) (Supp. II 1990), which requires participating States to "assure[] all children with disabilities the right to a free appropriate public education." The agency concluded that the States' obligations under the IDEA include an obligation to continue educational services outside the typical classroom setting for children sub-

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[3] The New York State School Boards Association and the California Department of Education have submitted amicus briefs challenging the agency's interpretation of the IDEA on the merits. Petitioner "has only challenged the [agency's] authority to issue its interpretation, not the interpretation itself." Pet. App. 15a. Accordingly, this case does not present the question whether the agency's interpretation of the law is correct.

ject to long-term suspensions or expulsion for behavior not related to their disabilities. The validity of the agency's construction stands or falls on its interpretation of the statutory language. The agency thus intended to issue an interpretive rule, not a rule "completely independent" of the statute. Pet. App. 7a. That straightforward analysis raises none of the doctrinal uncertainties that petitioner seeks to inject into this case.

a. Contrary to petitioner's suggestion (Pet. 9-10), there is no conflict between the decision in this case and the decisions of the District of Columbia Circuit in *Alaska* v. *Department of Transportation*, 868 F.2d 441, 445-447 (1989), and *Community Nutrition Institute* v. *Young*, 818 F.2d 943, 946-948 (1987). It is true that the opinions in those cases blurred to some extent the distinction between interpretive rules and "general statements of policy" (which are also exempt from notice and comment under the APA). But the District of Columbia Circuit clarified that distinction in *American Hosp. Ass'n* v. *Bowen*, 834 F.2d 1037, 1046-1047 (D.C. Cir. 1987). There, the court explained that general policy statements offer only the agency's "tentative intentions for the future," not a "binding norm." *Id.* at 1046. Accordingly, general policy statements do not bind agency officials or limit agency discretion. Interpretive rules, in contrast, permit agencies to restate statutory terms or explain ambiguous ones, and they reflect the agency's position on the statute. *Id.* at 1045.

More fundamentally, all interpretive rules are "binding" on the parties regulated by the statute in the sense that they set forth the agency's interpretation of the statute. As the court of appeals explained, Pet. App. 13a, it would make no sense for an agency to issue a rule setting forth its interpretation of statutory requirements, but stating that parties need not comply with

those requirements. The difference between interpretive and legislative rules is that the former, although entitled to deference, do not bind reviewing courts. See Pet. App. 8a.

b. Petitioner's reliance (Pet. 10) on *Rocky Mountain Helicopters, Inc.* v. *FAA*, 971 F.2d 544 (10th Cir. 1992), is misplaced. In that case, the Tenth Circuit stated that "a rule is substantive if * * * it changes existing law, policy, or practice." *Id.* at 546. In this case, the court of appeals found that the New Letter did not change existing policy. Instead, the court found that the issue simply had not arisen before May 1989. Pet. App. 9a. That factual determination merits no further review.

c. Petitioner also contends (Pet. 11-12) that the court of appeals' decision conflicts with decisions applying a "substantial impact" test to determine whether a rule is interpretive or legislative. In recent years, the courts of appeals have moved away from that test. See, *e.g.*, *Friedrich* v. *Secretary of Health & Human Services*, 894 F.2d 829, 836 (6th Cir.) ("extent of the impact is not an indicative factor"), cert. denied, 111 S. Ct. 59 (1990); *Industrial Safety Equipment Ass'n* v. *EPA*, 837 F.2d 1115, 1121 (D.C. Cir. 1988). In light of *Friedrich*, petitioner's reliance on an earlier Sixth Circuit decision is unwarranted. In fact, as *Friedrich* explained (894 F.2d at 836), the court's earlier decision in *Ohio Dep't of Human Services* v. *HHS*, 862 F.2d 1228, 1233-1234 (6th Cir. 1988), was not based on the substantial impact test, but rather on the fact that the agency had issued inconsistent interpretations of a regulation.

In *La Casa Del Convaleciente* v. *Sullivan*, 965 F.2d 1175 (1st Cir. 1992), the court of appeals noted that "[o]ther circuits * * * have moved away from considering the level of impact on interested parties as a factor in correctly classifying a rule or regulation." *Id.* at 1178 (citing authorities). The court noted (*ibid.*) that it had

looked to substantial impact "as a relevant factor in construing the intent of the agency" in *Levesque* v. *Block*, 723 F.2d 175, 182 (1st Cir. 1983). In *Convaleciente*, however, the court did not employ the substantial impact test, but instead based its conclusion that the rule at issue was interpretive on other factors. 965 F.2d at 1179. So too here, a variety of factors—including the fact that the New Letter relies on the language and legislative history of the IDEA, and "stands or falls on the correctness of its interpretation of the statute," Pet. App. 12a—show that the agency intended to issue an interpretation of the IDEA. Accordingly, there is no reason to believe that this case would have been decided differently by the First Circuit.[4]

d. Petitioner contends (Pet. 14-18) that the court of appeals' decision conflicts with *Chamber of Commerce* v. *OSHA*, 636 F.2d 464 (D.C. Cir. 1980). The agency rule at issue in *Chamber of Commerce* was contrary to the agency's prior position, a position that had been upheld in a prior decision of the District of Columbia Circuit. The court reasoned that the agency's rule was legislative because the "issuance of a different view solely as a matter of its own interpretation * * * would be a mere phasm of agency action, * * * [s]ignifying nothing." *Id.* at 469 (internal quotation marks omitted). Moreover, the court said, the agency "could not be explaining or clarifying the Act's language," because the court had already held that the Act did not impose an "existing duty." *Ibid.*

---

[4] In *Levesque*, the court rejected the view that substantial impact, without more, renders a rule legislative. 723 F.2d at 182. Moreover, the court's determination that the rule at issue in *Levesque* was legislative was based on the facts that (1) the agency utilized the good cause exception to the notice and comment procedures, and (2) the rule was an amendment to an earlier legislative rule promulgated with notice and comment. *Id.* at 179-183.

Chamber of Commerce has no application in this case. In *Doe* v. *Maher*, 793 F.2d 1470, 1481-1482 (9th Cir. 1986), aff'd in part, 484 U.S. 305 (1988), on which petitioner relies in seeking to draw an analogy to *Chamber of Commerce*, the plaintiffs were expelled for conduct that was related to their disabilities.[5] Consequently, the Ninth Circuit's observations concerning the continuation of educational services to students expelled for behavior unrelated to their disabilities are dicta. Moreover, other courts of appeals disagree with the Ninth Circuit's conclusion that the IDEA permits States to discontinue all educational services in those circumstances. *Kaelin* v. *Grubbs*, 682 F.2d 595, 602 (6th Cir. 1982); *S-1* v. *Turlington*, 635 F.2d 342, 348 (5th Cir.), cert. denied, 454 U.S. 1030 (1981). Cf. *School Bd.* v. *Malone*, 762 F.2d 1210, 1218 (4th Cir. 1985) (reserving question whether the State must continue to provide educational services to students expelled for misconduct not caused by their disabilities). In these circumstances, the agency's interpretation of the statute is not a mere "phasm of agency action, * * * [s]ignifying nothing." *Chamber of Commerce*, 636 F.2d at 469 (internal quotation marks omitted).[6]

---

[5] The plaintiffs in *Doe* v. *Maher* were two children with disabilities who had engaged in "dangerous or disruptive conduct growing out of their disabilities." *Honig* v. *Doe*, 484 U.S. at 308. See also *Doe* v. *Maher*, 793 F.2d at 1476-1477.

[6] In *National Family Planning & Reproductive Health Ass'n* v. *Sullivan*, 979 F.2d 227, 231 (D.C. Cir. 1992), the court concluded that "[w]hen an agency promulgates a legislative regulation by notice and comment, * * * whose meaning the agency announces as clear and definitive to the public and, on challenge, to the Supreme Court, it may not subsequently repudiate that announced meaning and substitute for it a totally different meaning without proceeding through the notice and comment rulemaking normally required for amendments of a rule." Here, the agency did not seek

2. Finally, petitioner contends (Pet. 20-21) that under 20 U.S.C. 1417(b), all agency interpretations of the IDEA are subject to notice and comment procedures. Section 1417(b) provides:

> In carrying out the provisions of this subchapter, the Secretary shall issue, not later than January 1, 1977, amend, and revoke such rules and regulations as may be necessary. No other less formal method of implementing such provisions is authorized.

Petitioner contends (Pet. 21) that the court of appeals' decision renders "meaningless surplusage" the statutory terms "amend" and "revoke." But the New Letter neither amends nor revokes a prior rule or regulation. And in any event, Section 1417(b) merely ensured the timely implementation of legislative rules implementing the 1975 amendments.[7] See Pet. App. 15a-16a. There is no basis for petitioner's contention that Section 1417(b) goes beyond that modest purpose and abrogates the agency's authority to interpret the IDEA.

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to amend a legislative rule, and no contrary interpretation by the agency had been presented to or upheld by this Court.

[7] Congress enacted Section 1417(b) as part of the 1975 amendments to the statute. Congress delayed the effective date of many of the new provisions until October 1, 1977. See 20 U.S.C. 1411 note. The January 1, 1977, deadline for legislative rulemaking gave the States an opportunity to meet their new legal obligations by October 1, 1977.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 92-929

In the
Supreme Court of the United States
October Term, 1992

METROPOLITAN SCHOOL DISTRICT OF WAYNE TOWNSHIP, MARION COUNTY, INDIANA, on behalf of itself, and all others similarly situated,

Petitioner,

v.

ROBERT R. DAVILA, Assistant Secretary, Office of Special Education and Rehabilitative Services, United States Department of Education,

Respondent,

ON PETITION FOR WRIT OF CERTIORIARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF AMICUS CURIAE OF THE NEW YORK STATE SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF THE AMICUS

This brief is filed with consent of both parties. Letters of consent are on file with the Clerk of this Court.

Amicus Curiae, New York State School Boards Association (NYSSBA), is a not-

for-profit corporate instrumentality of the public school districts of the State of New York, and represents approximately seven hundred forty (740) or ninety-four percent (94%) of such public school districts who are members of this Association. Pursuant to section 1618 of the Education Law of the State of New York, NYSSBA has the responsibility of devising practical ways and means of attaining greater economy and efficiency in the administration of public school district affairs and projects.

Unlike public school districts in Indiana, New York public schools are already required by the State's Education Law to provide alternative educational services to <u>all</u> students suspended from school for disciplinary reasons. This statutory obligation predates the New

Letter at issue in the present case. Therefore, the New Letter bears no new responsibilities or fiscal implications for public school districts in New York State.

Accordingly, NYSSBA's interest in the present case concerns itself with the implications raised by respondent's position.

REASONS FOR GRANTING THE WRIT

This Court should grant the writ of certioriari because aside from the procedural issues raised by petitioner, the New Letter promulgated by respondent, and challenged herein, constitutes an unwarranted and untenable expansion of this Court's ruling in Honig v. Doe, 484 U.S. 305 (1988).

Respondent's New Letter expands Honig to afford children with

disabilities who engage in disruptive conduct unrelated to their disability all of the protections available under the Individuals with Disabilities Education Act (IDEA), including the implementation of "stay put" provisions which were applied by this Court in Honig, to require that disabled students who are suspended for a period beyond ten days for misconduct arising out of their disability not have the placement set forth in their individualized educational program (IEP) changed unilaterally by the school district.

Such an expansion of Honig additionally communicates to children with disabilities the message that their condition places them above the law and excuses them from taking responsibility for their actions.

Amicus respectfully requests that this Court address this issue and clearly set forth that its pronouncements in Honig were never intended to communicate such a message, and that the New Letter constitutes an invalid expansion of the Court's ruling in said case.

ARGUMENT

Relying on Honig v. Doe, 484 U.S. 305 (1988) and other cases, respondent, in the New Letter, concluded that Part B of the Education of the Handicapped Act, now the Individual with Disabilities Education Act (IDEA), requires that students with disabilities be provided with educational services during periods of long-term suspension even where the misbehavior warranting such disciplinary action is not a manifestation of a student's disability.

In Honig, however, this Court reviewed the legality of unilateral long-term suspensions of students with disabilities, for a period beyond 10 days, from their regular public school assignments, for disciplinary problems arising out of conduct related to their disability. Honig did not address the issue of long-term suspension of students with disabilities when the misconduct does not arise out of, and is unrelated to, a student's disability. Therefore, respondent's letter implicitly extends the Honig ruling into this latter context by dismissing any distinction between misconduct arising out of a student's disability and misconduct which does not.

Amicus respectfully submits that this Court's ruling in Honig should not be extended as a blanket prohibition of

all long-term suspensions of students with disabilities unilaterally imposed by school districts.

In Honig, this Court determined that the unilateral long-term suspension of students with disabilities for misbehavior which is a manifestation of a student's disability is unlawful because it effects an unauthorized change in placement under IDEA. Any such suspension requires a review of the student's IEP and the retention of the student in his/her "current educational placement" pending all appeals, unless the student's parents agree to an interim placement, or other appropriate relief is granted by the courts.

The question then arises as to whether this "stay put" requirement also applies in situations where a student's

misbehavior is unrelated to his/her disability, as the New Letter appears to imply. The effect of an affirmative answer is to create a class of students who because of their unique circumstances are placed above the law and not required to suffer the consequences of their actions.

According to the New Letter, all disabled students who are subject to long-term suspension are entitled, as of right, to educational services for the duration of any such period. Because respondent dismisses any distinction between misconduct which arises out of a student's disability, and misconduct which does not, it follows that the long-term suspension of students with disabilities for conduct which is not a manifestation of their disability is

subject to the stay put provisions set forth in Honig as applicable to suspensions for misconduct arising out of a student's disability. Consequently, disabled students who are subjected to long-term suspensions for misconduct unrelated to their disability must remain in their individual "current educational placement".

The New Letter fails to consider local statutory and regulatory provisions which require the provision of alternative educational services to suspended students. In New York, for example, Education Law §3214 requires that all students suspended from classroom instruction be provided with alternative educational services from day one, irrespective of the length of their suspension. The statute makes no

distinction between students with disabilities and students without disabilites. But the New Letter, and its expansion of Honig, may invalidate, as a matter of law, the provision of such alternative services by requiring the implementation of IDEA's "stay put" provisions for long-term suspensions even where the misconduct necessitating such disciplinary action is unrelated to the student's disability.

To follow the logic of respondent's position and its expansion of Honig, a school district would not be able to unilaterally impose a long-term suspension on a student who, for example, is hearing impaired and violates the district's policy on substance abuse, even though alternative educational services are provided to such a student

pursuant to state statute, and even though students without disabilities engaging in the same type of conduct would be subjected to such disciplinary action. Amicus respectfully submits that such an outcome is detrimental to the integrity of this nation's system of public education.

Unlike the State of Indiana and others, New York is not placed by the New Letter in a position of having to expend additional funds to provide educational services to suspended disabled students as, pursuant to state law, it must provide such services. Amicus, as the representative of ninety-four percent (94%) of the public school districts of New York State, is nonetheless concerned about the implications of the New Letter as an expansion of Honig, as well as its

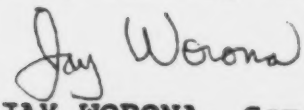
impact on the educational public policy of this nation.

Public policy and law dictates that children with disabilities be afforded a free appropriate education. However, such a right does not entitle disabled students to services above the law. If students engage in conduct which is unrelated to their disability, they should understand and be made to suffer the consequences of their actions.

CONCLUSION

For the above stated reasons, Amicus respectfully requests that this Court grant the petitioner for writ of certiorari, and address the various issues raised so as to provide school districts throughout the nation with much needed answers.

Respectfully submitted,



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No. 92-929

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1992

METROPOLITAN SCHOOL DISTRICT OF WAYNE TOWNSHIP, MARION COUNTY, INDIANA, on behalf of itself, and all others similarly situated,
Petitioner,

v.

ROBERT R. DAVILA, Assistant Secretary, Office of Special Education and Rehabilitative Services, United States Department of Education,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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AMICI CURIAE BRIEF OF THE CALIFORNIA DEPARTMENT OF EDUCATION AND THE NATIONAL ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS IN SUPPORT OF PETITIONER METROPOLITAN SCHOOL, ET AL.

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QUESTION PRESENTED

Is there any basis, in law, education, or common sense, which supports Respondent's interpretation of the Individuals with Disabilities Education Act (IDEA) requiring states and schools to continue educational services in cases of expulsion even when there was no causal relationship between the student's disability and the conduct?

INTEREST OF AMICI

This brief amici curiae is respectfully submitted pursuant to Supreme Court Rule No. 36. Consent to the filing of this brief has been granted the California Department of Education (CDE) by counsel for all parties. The letters of consent have been lodged with the Clerk of this Court.

The California Department of Education has been on record, since May of 1990, soon after the publication of Respondent's letter to Dr. Frank New, Ohio State Special Education Director, strongly opposing Respondent's contention that the Individuals with Disabilities Education Act requires local educational agencies (LEAs) to continue providing special education instruction and related services to students who are appropriately expelled from school. Bill Honig, California Superintendent of Public Instruction, and the California Department of Education respectfully submit that neither this Court's decision in *Honig v. Doe*, 484 U.S. 308 (1988), nor the IDEA supports Respondent's interpretation. Respondent's interpretation, moreover, is educationally illogical.

Another organization, the National Association of Secondary School Principals (NASSP), has asked to join the California Department of Education in its support of the petition for writ of certiorari.[1] NASSP is a voluntary association of approximately 43,000 administrators of public and private schools throughout the United States. NASSP was organized in 1916 to aid in the improvement of educational programs for students enrolled in these schools and to provide a spokesman for secondary school administrators on matters of education policy.

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[1] This request was made on December 15, 1992, the day before this brief was scheduled to go to the printer. Given the printer's schedule, the winter holidays, and a December 30, 1992, filing deadline, there was no time to secure additional written consent from the parties.

ARGUMENT

THE *HONIG v. DOE* DECISION DOES NOT SUPPORT THE RESPONDENT'S INTERPRETATION THAT POST-EXPULSION SPECIAL EDUCATION SERVICES ARE MANDATED

Superintendent Honig, when fashioning the questions he wished the Supreme Court to address in *Honig v. Doe, supra,* did not have post-expulsion special education services in mind. In his petition for writ of certiorari, he asked that only two issues be addressed: (a) the authority of local school administrators to unilaterally remove an exceptionally dangerous student from his or her current special education placement, without parental consent, and in lieu of the "stay put" provision in 20 U.S.C. § 1415(e)(3); and (b) whether 20 U.S.C. § 1414 could be reasonably construed to mean that a state educational agency must provide direct services to an individual special education student when a local school district fails to do so.

Despite the fact that the United States Court of Appeals for the Ninth Circuit, in *Doe v. Maher,* 793 F.2d 1470, 1482 (9th Cir. 1986), ruled that post-expulsion services are not required, counsel for Doe did not petition the Supreme Court to review this ruling. This is born out by Justice Brennan's characterization of the two central issues before the Court:

> Today we must decide whether in the face of this statutory prescription state or local school authorities may nevertheless unilaterally exclude disabled children from the classroom for dangerous or disruptive conduct growing out of their disabilities. In addition, we are called upon to decide whether a district court may, in the exercise of its equitable powers, order a state to provide educational services directly to a disabled child when the local agency fails to do so.

Honig, 484 U.S. at 308.

Respondent, however, in an attempt to justify his position in the New Letter, referred to the following portions of Justice Brennan's decision as a partial basis for his disputed assertions:

> Our conclusion that Sec. 1415(e)(3) means what it says does not leave educators hamstrung. The Department of Education has observed that, "[w]hile the [child's] placement may not be changed [during any complaint proceeding], this does not preclude the agency from using its normal procedures for dealing with children who are endangering themselves or others . . ." More drastically, where a student poses an immediate threat to the safety of others, officials may temporarily suspend him or her for up to ten school days.
>
> This authority, which respondent in no way disputes, not only ensures that school administrators can protect the safety of others by promptly removing the most dangerous of students, it also provides a 'cooling down' period during which officials can initiate IEP review and seek to persuade the child's parents to agree to an interim placement. And in those cases in which the parents of a truly dangerous child adamantly refuse to permit any change in placement, the 10-day respite gives school officials an opportunity to invoke the aid of the courts under § 1415(e)(2), which empowers courts to grant any appropriate relief.

Id. at 325-326. (Emphasis added.)

Neither of these two passages is even remotely related to the provision of post-expulsion special education services. From amici's reading of the New Letter, Respondent apparently believes that Justice Brennan meant that educators are not "hamstrung" from providing post-expulsion services to an expelled special education student. However, this makes no sense. Justice Brennan's meaning is abundantly clear: that educators will not be "hamstrung" by the Court's decision, because they still have administrative options when a student "poses an immediate threat to the safety of others." He also explained that school officials can suspend such students for a limited period of time, and that in cases in which parents of a "truly dangerous child adamantly refuse to permit any change in

placement," they have the added option of invoking the aid of the courts under § 1415(e)(2), which "empowers courts to grant any appropriate relief." *Id.* at 326.

A fair reading of the Court's opinion demonstrates that *Honig v. Doe* was not about post-expulsion educational requirements. Respondent's endeavor to construe *Honig* to the contrary is groundless.

THE IDEA AND ITS LEGISLATIVE HISTORY PROVIDE NO JUSTIFICATION FOR RESPONDENT'S INTERPRETATION

Respondent's reliance on the IDEA and its legislative history has no merit. He bases much of his theory on the following language in *Mills v. Board of Education,* 348 F.Supp. 866 (D. D.C. 1972):

> No child eligible for a publicly-supported education in the District of Columbia public schools shall be excluded from a regular public school assignment by a rule, policy, or practice of the Board of Education . . . or its agents unless such child is provided:
>
> (a) adequate alternative educational services suited to the child's needs, which may include special education or tuition grants and,
>
> (b) a Constitutionally adequate prior hearing and periodic review of the child's status, progress, and the adequacy of any educational alternative. S. Rep. No. 168 at 6.

This language is not determinative. The fundamental public policy issue which both *Mills* and Congress addressed concerned the historic and wholesale discriminatory exclusion of handicapped children whose behavioral problems were a manifestation of their handicapping condition. At this point in time (the early 1970s), **unfettered equal access to public education** was the critical issue, not the intricacies of expulsion procedures or the ongoing educational requirements subsequent to expulsion.

As Justice Brennan indicated in *Honig v. Doe,* 484 U.S. at 324, *Mills* "demonstrated the extent to which schools used disciplinary measures to

bar children from the classroom." He also stated that school officials had been labeling students as behavioral problems and "had excluded them from class without providing any alternative education to them or any notice to their parents." *Ibid.* Congress responded to this problem by requiring LEAs to educate all handicapped children regardless of their disability. 20 U.S.C. § 1400(c).

Respondent cannot reasonably enlarge the scope of the fundamental issues, and rulings in *Mills* cannot be inappropriately enlarged to include substantive mandates concerning post-expulsion educational services. Congress' reliance on the language in *Mills* was intended to focus the country's attention on the fact that these children must be included in all aspects of public education. Respondent's dependence on *Mills,* to construe the IDEA with respect to post-expulsion services, is meritless.

In addition, Congress has never included disciplinary procedures in the IDEA. The only such reference is its implementing regulations at 34 CFR §300.513, Comment:

> Reg. 300:513 does not permit a child's placement to be changed during a complaint proceeding, unless the parents and agency agree otherwise. While the placement may not be changed this does not preclude the agency from using its normal procedures for dealing with children who are endangering themselves or others.[2] (Emphasis added.)

There has been an abundance of litigation concerning discipline during the last 12 years. This is because neither the statute nor its regulations have given local and state officials sufficient guidance in these matters. Justice Brennan noted that in situations in which Congress' intentions may have been ambiguous, the courts may defer to the construction of an administrative agency. *Honig v. Doe,* 484 U.S. at 325 n. 8. However, since the IDEA has never explicitly referred to either expulsion or discipline, it must be concluded that Congress' silence has been unambiguous. Under these circumstances, Respondent did not have the authority to construe the IDEA as it did in the New Letter.

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[2] Expulsion, i.e., the cessation of educational services, has been a "normal" and traditional option for students who are endangering themselves or others.

THE NINTH CIRCUIT'S RULING AFFIRMING CESSATION OF EDUCATIONAL SERVICES UPON A PROPER EXPULSION IS THE MOST AUTHORITATIVE OF ALL RULINGS ON THE ISSUE AND SHOULD BE GIVEN GREAT WEIGHT BY THIS COURT

Superintendent Honig considered the permanent injunction against the California Department of Education, *Doe v. Maher*, No. C-80-4270 MHP (N.D.Cal., 1984), to be overbroad and beyond the scope of the IDEA, and appealed it to the 9th Circuit. The 9th Circuit, in addition to overruling the lower decision in part, ruled that the expulsion of a special education student does not violate the IDEA and that *an LEA has the right to withhold services from a student who has been expelled.*

> When a child's misbehavior does not result from his handicapping condition, there is simply no justification for exempting him from the rules, including those regarding expulsion, applicable to other children. Therefore, when a handicapped child is properly expelled, the school district may cease providing all educational services—just as it could in any other case. To do otherwise would amount to asserting that all acts of a handicapped child, both good and bad, are fairly attributable to his handicap. We know that that is not the case.

Doe v. Maher, 793 F.2d 1470, 1482 (9th Cir. 1986), aff'd and modified sub nom., *Honig v. Doe*, 484 U.S. 305 (1988).

While other courts have held differently, the ruling in *Doe v. Maher* is the only one which provides an analytical basis for its support. The first federal appeals court decision which rejected cessation was *S-1 v. Turlington*, 635 F.2d 342, 348 (5th Cir. 1981), which has been favorably cited by each of the other courts.[3] However, *Turlington* and its progeny deserve little attention for three reasons:

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[3] *Kaelin v. Grubbs*, 682 F.2d 595 (6th Cir. 1982), *Bd. of Education, City of Peoria v. Illinois State Bd. of Educ.*, 531 F.Supp. 148 (C. D., Ill. 1982), *Lamont v. Quisenberry*, No. C-1-84-1417, slip op. at (S.D. of W. Div. Ohio 1985), and *Doe v. Rockingham*, 658 F.Supp. 403 (W.D. Va. 1987).

(a) it is doubtful that the Court in *Turlington* had jurisdiction over the cessation issue, because the issue had never been raised by the parties;[4]

(b) none of the decisions included grounds or analyses with which to support their rejection of cessation; and

(c) inasmuch as "expulsion" is commonly defined as the denial of rights or privileges, it is contradictory to affirm expulsion as a proper disciplinary tool, as did *Turlington*, and then simultaneously reject the cessation of services. *Id.* at 270.

As the 9th Circuit implied in *Doe v. Maher*, 793 F.2d at 1482, it is legally and educationally illogical to allow an LEA to expel a student and to then require it to, nevertheless, educate the student.

PUBLIC POLICY DOES NOT SUPPORT THE CONTINUATION OF EDUCATIONAL SERVICES TO HANDICAPPED STUDENTS WHO HAVE BEEN EXPELLED FOR REASONS UNRELATED TO THEIR HANDICAP

Amici are aware of no federal case which has construed the IDEA to mean that a special education student *cannot* be expelled, as long as the student is afforded administrative due process. The purpose of an expulsion (under typical circumstances) is to remove a student from public education who is either disruptive of the educational process or imminently dangerous to himself, herself, or others. The public policy advanced by an expulsion is, essentially, to maintain a safe school environment and to provide the expelled student with a painful, but memorable lesson regarding self-control and the "law of natural consequences."

When it is determined that a special education student's misconduct is not a manifestation of the student's disability and the student's individualized educational program was appropriate, the student, for purposes of schoolwide disciplinary procedures, should be treated as a general education student (unless the student invokes administrative review of

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[4] The Statement of Issues set forth by the Court does not include cessation as an issue. 635 F.2d at 268.

this determination). If either the parents or a state hearing officer agrees with the determination that a student's misconduct is not a manifestation of the disability, the state's regular expulsion and post-expulsion procedures apply. *Doe v. Maher*, 793 F.2d at 1482.

The legislative history of the IDEA neither states nor implies that special education students are entitled to more rights than their general education counterparts. Special education students are entitled to a free appropriate public education. They are entitled to an instructional program designed by an interdisciplinary team, which includes their parents, to meet their unique educational needs. But when a special education student commits an offense which is deserving of expulsion, which means that the misconduct was found to be egregious and not a manifestation of his or her disability, the student, for post-expulsion purposes, should pay the same price as any other student in the school.

When fair administrative procedures are applied to expulsions of all students regardless of their disability or other special circumstances governed by law, such processes should neither be struck down by the courts nor regulated in accordance with the whims of any government bureaucracy.

CONCLUSION

The petition for writ of certiorari should be granted; and, thereafter, the opinion of the court of appeals reported at 969 F.2d 485 should be reversed.

Dated: December 16, 1992

Respectfully submitted,

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No. 92-929

Supreme Court, U.S.
FILED
JAN 28 1993
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

METROPOLITAN SCHOOL DISTRICT OF
WAYNE TOWNSHIP, MARION COUNTY, INDIANA, on
behalf of itself and
all others similarly situated,
Petitioner,

v.

ROBERT R. DAVILA, Assistant Secretary,
Office of Special Education and
Rehabilitative Services,
United States Department of Education,
Respondent,

BRIEF *AMICI CURIAE* OF THE NATIONAL ASSOCIATION OF STATE DIRECTORS OF SPECIAL EDUCATION, INC. THE NATIONAL ASSOCIATION OF STATE BOARDS OF EDUCATION THE COUNCIL FOR EXCEPTIONAL CHILDREN THE COUNCIL OF ADMINISTRATORS OF SPECIAL EDUCATION

IN SUPPORT OF
PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF THE *AMICI CURIAE*

The National Association of State Directors of Special Education, Inc. ("NASDSE") is a nonprofit organization representing state education agencies and their administrators, who are directly responsible for directing, coordinating and supervising education programs for children with disabilities. Its members include State Columbia, Puerto Rico, the Bureau of Indian Affairs, and the Pacific agency administrators in each of the 50 states, the District of jurisdictions.

The National Association of State Boards of Education ("NASBE") is a nonprofit, private association that represents state and territorial boards of education in 47 states and territories. Its principal objectives are to strengthen state leadership in education policymaking; promote excellence in the education of all students; advocate equality of access to educational opportunity; and assure responsible lay governance of public education.

The Council for Exceptional Children ("CEC") is the largest professional organization in the United States of educators actively serving children with disabilities. CEC participates as *amicus* because of its members' concern that the mechanisms for goals established by the Individual with Disabilities Act ("IDEA") be discharged properly.

The Council of Administrators of Special Education ("CASE"), a division of CEC, is a nonprofit organization representing local administrators of special education responsible for administering and supervising programs for children and youth with disabilities in local school districts. CASE was founded in 1952 and its over 5,000 members include state administrators and trainers of administrators, but are primarily local administrators in all 50 states, the District of Columbia, Puerto Rico, the Bureau of Indian Affairs, and Guam.

STATEMENT

All of the state and local education agencies ("SEAs" and "LEAs") represented by *amici* receive Federal financial assistance under the grant program established by Part B of the Individuals with Disabilities Education Act ("IDEA/B", formerly the Education of the Handicapped Act, "EHA"), 20 U.S.C. § 1411 *et seq.* In the 1992-93 school year, these funds amount to $1,976,095,000. These funds are initially distributed by the U.S. Department of Education ("the Department") to SEAs; a minimum of 75% is redistributed ("flowed through") to LEAs. To qualify for these funds, the SEAs and the LEAs must satisfy the requirements of Part B, and the regulations implementing those statutes, 34 C.F.R. Part 300, as administered by the Department's Office of Special Education and Rehabilitative Services ("OSERS"). This grant program is directly administered by the Office of Special Education Programs ("OSEP", previously called the Office of Special Education ("OSE") and, prior to that, the Bureau of Education of the Handicapped("BEH")), which necessarily involves a close working relationship with *amici* and their respective members.

OSEP disburses Part B funds after receiving from an SEA and approving a state plan that meets the extremely detailed requirements of IDEA, §§ 1412-13 and the implementing regulations. Similarly, LEAs must meet the requirements of IDEA, § 1414 and the implementing regulations before they receive funds from an SEA. SEAs and LEAs receive technical assistance on meeting these requirements through OSEP's monitoring process (on-site inspections and discussions with SEA and LEA personnel, parents, advocates and others), comments on the grant applications and explanatory documents.

The explanatory documents issued by OSEP fall into two broad categories: formal[1] and informal. The formal documents

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[1] The Department's formal policy making documents are quite limited in number. They consist of: (1) Appendix C to 34 C.F.R. 300, a series of detailed questions and answers interpreting the requirements concerning individual

(continued...)

are disseminated either by publication in the Federal Register or direct distribution to various mail lists. The informal documents consist primarily of correspondence between OSERS or OSEP and the general public, including members represented by *amici*. This correspondence is generated when OSERS or OSEP receives a request to interpret IDEA/B or its regulations. A response may be given by OSERS or OSEP and is transmitted only to the person who has submitted the request. There is no prescribed dissemination or compilation of this correspondence. The "New Letter" that is the subject of this proceeding is an example of this correspondence.[2] It was written in response to an inquiry by Frank E. New, then-Director of the Ohio Division of Special Education concerning the application of State suspension and expulsion policies under IDEA/B.

Amici participate in this proceeding because of their members' concern about the process underlying the New Letter. None of the *amici* take a position at this time on the merits of the position expressed in that letter; their sole interest is procedural. *Amici* do not, of course, urge that the Department has no authority to issue these letters. *Amici* object, however, to the Department's attempt to impose new, broad obligations upon every school district in the Nation, in the absence of statutory authority and without following the rulemaking procedures established by Congress, where the penalty for noncompliance ultimately may be loss of Federal funding.

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[1](...continued)
education programs, added by 46 F.R. 5460 (January 19, 1981); (2) two official "Policy Interpretations" — one concerning use of insurance proceeds, adopted in 45 F.R. 86390 (December 30, 1980) and the other discussing catheterization as a related service, proposed but postponed, 46 F.R. 25614 (1981); and (3) bulletins from BEH's Division of Assistance to States ("DAS Bulletins"), of which 112 were issued from 1977 until 1984 when they were superceded by "OSEP Memoranda", which continue to this day. It is noteworthy, *amici* suggest, that the Department used the formal policy making process represented by all of these documents to address subjects far more clearly within the scope of its authority than the subject matter of this proceeding.

[2] The background of the "New Letter" is described in petitioner's brief at page 3 and is reprinted there in Appendix E., page 39a.

SUMMARY OF THE ARGUMENT

This case raises important and fundamental questions about the power of any Department or agency of the Executive Branch, in the absence of statutory authority, to impose new obligations upon State or local governments. The Department contends that its authority is found in IDEA/B, a statute enacted to assure students with disabilities their access to a "free appropriate public education" and to due process in protecting that access. It is only those four quoted words the Department cites in support of its conclusion in the New Letter. The Department also maintains that its conclusion is supported by this Court's decision in *Honig v. Doe*, 384 U.S. 305 (1984). But the Department's own previous statements and actions conclusively demonstrate that it does not have the statutory authority to issue the New Letter. In issuing the New Letter, the Department clearly violated Congressional restrictions imposed by IDEA/B, § 1417(b); it also blatantly disregarded the procedures that OSERS declared it would follow in enunciating policy on discipline of students with disabilities. This Court's intervention is required at this stage because available administrative and judicial remedies are inadequate to resolve the conflict between the circuits on the substantive issue underlying this dispute. The Department has attempted, in issuing the New Letter, to resolve this conflict by imposing its policy preference without the formal rulemaking process Congress envisioned. Given the serious risk of financial sanctions for not complying with a newly stated policy, few state or local education agencies are likely to challenged it openly by refusing to comply.

ARGUMENT

I. THE DEPARTMENT'S OWN PREVIOUS STATEMENTS AND ACTIONS CONCERNING SUSPENSION AND EXPULSION, THIS COURT'S DECISION IN *HONIG v. DOE*, AND THE DEPARTMENT'S PREVIOUS INTERPRETATION OF THAT DECISION DEMONSTRATE THAT THE DEPARTMENT DOES NOT HAVE THE STATUTORY AUTHORITY TO ISSUE THE NEW LETTER.

The Seventh Circuit, noting that the distinction between interpretive and substantive rules is "admittedly far from crystal-clear," held that the New Letter was interpretive because the Department said it was interpretive.[3] Certainly the Department's characterization of its own letter is entitled to some weight.[4] However, where, as here, the Department "interprets" statutory language of such broad or vague scope as "free appropriate public education," a court should be vigilant in determining the basis for the Department's interpretive authority.[5] Additionally, the Department's characterization should be viewed with some skepticism where previous Departmental actions bespeak a great deal of uncertainty about its authority to make policy in this area.

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[3] "Basically, then, this test returns us to the starting point set forth by the District of Columbia Circuit — what kind of rules does the agency think it has promulgated?" 969 F.2d 485 at 490.

Whether the New Letter is ultimately determined to be "legislative" or "interpretive" is of little consequence to education agencies because the practical result is the same: they must either comply with the policy enunciated in the letter or risk termination of Federal funding.

[4] *National Solid Waste Management Ass'n v. EPA*, 27 Env't Rep. Cas. (BNA) 1566 (D.C. Cir. Oct. 27, 1987), as noted in Anthony, Robert A., "Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like — Should Federal Agencies Use Them to Bind the Public?," 41 DUKE LAW JOURNAL 1311 (No. 6, June 1992) at 1318, fn. 25.

[5] Anthony, Robert A., "'Well, You Want the Permit, Don't You?', 44 ADMINISTRATIVE LAW REVIEW 31, 40 (1992).

The fact is that the record is replete with past actions and statements by OSERS clearly indicating the Department's uncertainty about what, if anything, Congress intended about suspension and expulsion and the scope of its authority on this issue. These actions and statements also document that the Department has considered the existence of a nexus between a student's disability and his misconduct to be a material factor in determining appropriate disciplinary action. These indications include the following actions and statements.

1. In April 1980, the Department of Justice filed an *amicus* brief on behalf of the Department of Education in *S-1 v. Turlington*, 635 F.2d 342 (5th Cir. 1981) (Unit B), the first decision addressing disciplinary questions under IDEA, where it urged, *inter alia*, that a student with disabilities could not be suspended or expelled without prior individual determination of whether there was relation between misconduct and disability. There would be no point in urging this prior determination if the distinction was not crucial to determining appropriate disciplinary procedures.

2. Later that same year, in Final Report to the Secretary of the Task Force on Equal Educational Opportunity for Handicapped Children (October 15, 1980), the Secretary of Education was advised:

> "*Suspension and expulsion of handicapped children.* OSE and OCR have each prepared decision memoranda and documents proposed for publication in the Federal Register for your review. Efforts are now under way to develop a joint decision memorandum and documents for publication in order to facilitate a well-informed and speedy publication process."[6]

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[6] *As reprinted in* 1980-81 EHLR DEC., Analysis and Comment, Issue 35 (October 31, 1980), p. AC67 at p. AC74,

Presumably this reflects a belief that utilizing the formal rulemaking process was required for the exercise of the Department's authority.

3. Shortly thereafter, in its "Notice of intent to develop regulations, interpretive rules or policy statements," the Department explicitly stated:

> **"G. Suspension and Expulsion**
>
> "Current EHA-B and Section 504 regulations do not provide complete guidance on the extent to which school authorities are permitted to discipline handicapped children by suspending or expelling them from school. In a legal brief submitted as a friend of the court in *S-1 v. Turlington* (5th Cir. April, 1980), the Department took the position that expulsion of handicapped students without a prior, individual determination of the relationship between a student's misconduct and (1) his or her handicap; or (2) any inappropriate placement violated EHA-B and Section 504.
>
> "1. Where a determination has been made that a handicapped student's behavior is not related to his or her handicap or any inappropriate placement, under what circumstances, if any, are long-term exclusions permissible?"[7]

This constitutes still further evidence of the Department's concern that the bare text of the law might not be sufficient to enunciate policy in interpretive letters and about the scope of its authority on this issue.

4. Still later, an OSERS "Briefing Paper" implementing the Reagan Administration's effort to vastly reduce the number

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[7] 45 Federal Register 8502 (December 24, 1980).

and scope of Federal regulations,[8] in a specific discussion of suspension and expulsion questions, stated that from litigation to date:

> "It is not entirely clear from these decisions whether a handicapped child is absolutely shielded from long-term suspensions or expulsions regardless of whether there is any relationship between the handicap and the behavior."[9]

5. The same paper suggested, as a possible course of action to resolve questions concerning suspension and expulsion, that the Comment to Reg. 300.513 be deleted and the following subparagraph (3) be added:

> "(3) The public agency determines expressly, based upon professionally acceptable criteria, such change is necessary for disciplinary reasons, where the misconduct underlying the discipline is not a manifestation of the child's handicap."[10]

This is an explicit statement by the Department that the existence of a nexus between a student with disability's misconduct and his disability could be a critical factor in determining the appropriate disciplinary procedure.

6. Finally, there is the reference discussed by the Seventh Circuit,[11] in which OSEP responded to the question: "What are

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[8] Presidential Executive Order 12291 (January 29, 1981), 46 Fed. Reg. 13193 (February 17, 1981).

[9] *As reprinted in* 1981-82 EHLR DEC., Analysis and Comment, Issue 57 (October 2, 1981), p. AC188, at p. AC210.

[10] *Id.* at Par. 4, (4).

[11] *Metropolitan School District of Wayne County, Indiana v. Davila*, 969 F.2d 485 at 491 (7th Cir. 1992).

the issues and requirements related to suspension and expulsion?" OSEP stated:

> "Some courts looking at the discipline issue under both EHA-B and Section 504 have said that, when the misbehavior is unrelated to the handicapping condition, the child can be disciplined without regard to the fact that the child has a handicap. This is of interest because *the basis for this under EHA-B is not entirely clear.*"[12]

There could hardly be a clearer expression of the vagueness of the statute by an administering agency.

Despite its finding the New Letter to be "interpretive," the Seventh Circuit explicitly stated that this Court's decision in *Honig v. Doe*, 384 U.S. 305 (1984), "did not reach th[e] issue" addressed in the Letter.[13] In addition, *Honig* does not provide a basis for the New Letter for the following additional reasons.

First, *Honig* involved the disciplinary procedures followed regarding two students with disabilities where there was no question about the relationship of the students' misconduct and their disabilities.[14] The Ninth Circuit in that case properly found that IDEA prohibits the expulsion of students with disabilities for misbehavior that is a manifestation of their disabilities, *i.e.*, where there is a nexus. However, the Ninth Circuit also also ruled that the opposite result is required where no nexus is present:

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[12] OSEP Memorandum 87-21, Question 7, reproduced at EHLR 202:371 (emphasis supplied).

[13] 969 F.2d at 493.

[14] This Court stated that the students in *Honig* had exhibited "dangerous or disruptive conduct growing out of their disabilities." *Honig*, note 13, *supra*, at 308.

> "If the child's misbehavior is properly determined *not* to be a manifestation of his handicap, the handicapped child can be expelled. ... This conclusion does not conflict with the [IDEA]. When a child's misbehavior does not result from his handicapping condition, there is simply no justification for exempting him from the rules, including those regarding expulsion, applicable to other children. Therefore, when a handicapped child is properly expelled, the school district may cease providing all educational services — just as it could in any other case. To do otherwise would amount to asserting that all acts of a handicapped child, both good and bad, are fairly attributable to his handicap. We know that that is not so."

Doe v. Maher, 793 F.2d 1470, 1482 (9th Cir. 1986) [footnote and citations omitted].

This question was not directly addressed by this Court in *Honig*; accordingly *Honig* provides no basis for the Secretary's interpretation in the New Letter.

Second, the Secretary's reliance upon this Court's decision in *Honig* for its conclusion in the New Letter is erroneous because that decision was concerned about *unilateral* disciplinary action by schools, sanctions imposed in disregard of IDEA's procedural safeguards.[15] In fact, this Court expressly stated in *Honig* that neither the "structure [n]or legislative history [of IDEA] provide any guidance as to how the the term [change in placement] applies to fixed suspensions."[16] Even the Secretary's own characterization in the New Letter of this Court's decision in *Honig* reflects this limited reading:

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[15] "As the [IDEA's] legislative history makes clear, one of the evils Congress sought to remedy was the *unilateral* exclusion of disabled children by *schools*, ..." *Honig*, note 13, *supra*, at 325 [first emphasis supplied].

[16] *Honig v. Doe*, note 13, *supra*, at 326, fn 8.

> "The EHA-B has been found by the U.S. Supreme Court in its decision in *Honig v. Doe* [citation omitted], to prohibit State or local school authorities from *unilaterally* excluding children with handicaps ..."[17]

Third, the Seventh Circuit erroneously accepted the Department's assertion, by counsel during oral argument, that until the *Honig* decision, "it was unclear whether disabled children could be disciplined at all under the Act."[18] The regulations initially proposed to implement what is now IDEA provided, *inter alia*, that a student's placement must remain unchanged pending any proceeding regarding that placement.[19] However, before adopting the final regulations, the Department added the following comment:

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[17] New (OSEP 1989), EHLR 213:258 (emphasis supplied). Soon after the *Honig* decision was handed down, OSERS responded to concerns about its impact by stating that:

> "...this is not a case where the Court prevents schools from acting in the best interests of all children. Rather, the Supreme Court followed an explicit statutory provision and held that, when pursuing a drastic solution such as a long suspension or expulsion of a handicapped child, a school district *must follow the orderly process* prescribed in the [IDEA]."

Emerson (OSEP 1988), EHLR 213:146, 213:147 [emphasis supplied]. This emphasis on process, repeated in the New Letter, is the more accurate interpretation of *Honig*, and thus provides no support for the Department's ultimate conclusion.

[18] 969 F.2d at 491.

[19] Proposed Pub.L. 94-142 Regulations, 41 Fed. Reg. 56965 (December 30, 1976), at Reg. § 121a.413, 41 Fed. Reg. 56990-91; this regulation is now found at 34 C.F.R. § 300.513.

> "While the placement may not be changed, this does not preclude the agency [school district] from using its normal procedures for dealing with children who are endangering themselves or others."[20]

In its analysis of the final regulations, the Department explained:

> "A comment has been added to make it clear that this section would not preclude a public agency from using its regular procedures for dealing with emergencies."[21]

Inasmuch as a school district's "regular procedures" for dealing with emergencies must include its disciplinary procedures, obviously the Department has believed from the very beginning that students with disabilities can be subjected to <u>some</u> disciplinary actions.

II. THE NEW LETTER WAS ISSUED CONTRARY TO CONGRESSIONAL DIRECTION THAT IDEA/B BE IMPLEMENTED ONLY THROUGH THE FORMAL RULEMAKING PROCESS AND IN DISREGARD OF THE PROCEDURES OSEP ASSURED IT WOULD FOLLOW.

The Seventh Circuit found that IDEA, 20 U.S.C. § 1417(b) "was designed to ensure that the rules necessary to implement the Act would be in place early enough to allow states to fulfill their statutory obligations by the effective date of the Act." 969 F.2d at 494. It also observed that the Department's delegated legislative authority, and its exercise of that authority, does not remove the Department's inherent authority to issue interpretive rules. It concluded that the provision "authorizes

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[20] *Ibid.*

[21] APPENDIX A — ANALYSIS OF FINAL REGULATION (45 CFR PART 121A) UNDER PART B OF THE EDUCATION OF THE HANDICAPPED ACT, 42 Fed. Reg. 42474, 42495 (August 23, 1977).

legislative rulemaking, it does not revoke interpretive authority." *Id.* This construction not only ignores the plain language of the statute; it also ignores the historical concerns that motivated Congress to impose the stated dual mandates upon the Department.

To be sure, in enacting § 1417(b), Congress was concerned that implementing regulations be timely adopted.[22] This concern stemmed from the reluctance of the then-Department of Health, Education and Welfare to formally adopt regulations implementing § 504 of the Rehabilitation Act of 1973, a statute whose history has been intertwined with IDEA from the enactment of each.[23] It is crucial to recall that

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[22] This fear was well grounded. For one thing, the legislation was opposed by the Department. See Statement of Frank C. Carlucci, Undersecretary of Health, Education and Welfare, before the Senate Subcommittee on the Handicapped, Committee on Labor and Public Welfare (June 17, 1974). Apparently Congress' skepticism required then-Secretary Caspar Weinberger to provide assurances:

> "Legislation passed by the Congress in the past two years gives the Executive Branch authority to enforce both the elimination of all discrimination against the handicapped in Federally assisted programs and activities (Section 504 of the Vocational Rehabilitation Act of 1973) and specific requirements for approving State plans to provide special education (Sections 612 and 615 of the Education Amendments of 1974).
>
> "I want to emphasize that both the Department and the Office of Education are taking these responsibilities seriously. Regulations to ensure state compliance with these statutes will be issued in the near future."

Letter from Caspar Weinberger, Secretary, Department of Health, Education and Welfare, to Senator Hugh Scott (R-Pa.) (June 9, 1975), Congressional Record S.10334-5 (June 11, 1975). But there were other grounds for concern. See *infra* text and footnotes 24, 29.

[23] Though § 504 of the Rehabilitation Act was enacted in 1973, no regulations had been implemented when Congress was considering the

(continued...)

although § 504 preceded IDEA by two years, final regulations were not adopted until 1978[24]; by contrast, because of IDEA §1417(b), implementing regulations for that statute were effective in 1977.[25]

Similar Congresssional apprehensions underlie the second sentence of § 1417(b): "No other less formal method of implementing such provisions is authorized." Congress was familiar with, and concerned by, the Department's history of administering a "sister" statute on an informal basis. For this reason, it imposed the highest standards of formality upon the Department of Education in adopting and amending policy stated in IDEA. Moreover, in construing this statute, this Court is bound to honor an express limitation on an agency's rulemaking authority.[26]

In addition, OSEP is attempting to impose burdensome, new obligations without following the procedures it committed

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[23](...continued)
legislation that became Pub.L. 94-142, or EHA, now IDEA, in 1974 and 1975, raising doubts among advocates for persons with disabilities that the statute would ever be enforced. Issuance of proposed regulations only followed nationwide demonstrations, a lawsuit, *Cherry v. Mathews*, 419 F.Supp. 922 (D. D.C. 1976), and finally Presidential Executive Order No. 11914 (April 24, 1976), 41 Fed. Reg. 17871.

[24] 43 Fed.Reg. 2132 (January 13, 1978).

[25] 42 Fed. Reg. 42473 (August 23, 1977). Originally codified at 45 C.F.R. Part 121a, the pertinent regulations are now found at 34 C.F.R. Part 300.

[26] § 1417(b) is not the only instance Congress expressed its concern about the procedures followed by the Department in implementing IDEA. In 1983, in response to the "de-regulation" initiative undertaken by the Reagan Administration, Congress added § 1407. This provision (a) extends the Congressional comment period under 20 U.S.C. § 1232(b) from 30 to 90 days and (b) bars the Secretary of Education from adopting any regulation that would lessen protections of IDEA "except to the extent that such regulation reflects the clear and unequivocal intent of the Congress in legislation." 20 U.S.C. §1407, as added by Pub.L. 98-199, Sec. 6, Dec. 2, 1983, 97 Stat. 1359.

itself to following. The Seventh Circuit referred to, misconstrued and, therefore, gave little weight to a formal document previously issued by OSEP in which it adopted a position contrary to that stated in the New Letter and stated it would not change without following certain procedures. In OSEP Memorandum 87-21, Question 7,[27] OSEP stated:

> "While this [issue, whether a child can be disciplined without regard to handicap where misbehavior is unrelated to the handicap] may deserve further thought, *OSEP will not apply a rule or guideline contrary to this in the absence of a generally applicable statement distributed in advance to the States.*" (emphasis supplied).

This assurance was ignored by issuance of the New Letter.

OSEP's position was not clarified when, subsequently, it advised SEAs about the standards it would use in reviewing state plans. The New Letter was issued on September 15, 1989. In February 1991, OSEP distributed the draft review checklist it would use for state plans effective for Fiscal Years 1992-94.[28] The state plan review checklist is the monitoring document OSEP staff use when reviewing state plans to determine if they comply with the requirements set forth in IDEA/B. The checklist contains no reference to the position stated in the New Letter, despite the advance planning that would be required for LEAs and SEAs to provide needed assurances.[29]

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[27] Note 12, *supra*.

[28] OSEP Memorandum 91-15 (February 20, 1991).

[29] The arbitrary nature of emunciating and implementing policy in this manner is illustrated by the experience some states have had since the New Letter was written. Although no documentation is available, some of the states whose plans were being reviewed during the last fiscal year were advised as follows concerning the issues of suspension and expulsion: if the state plan contains any statements regarding discipline, it must include a reference to the New Letter or to policies implementing the New Letter; if the state plan (continued...)

Although the position taken by OSEP in the New Letter is directly contrary to the position taken in Memorandum 87-21, OSEP did not notify state directors of education, the state-level persons primarily responsible for overseeing compliance with IDEA/B, either by generally distributing the New Letter to them or by including notice of its change of position in the state plan review checklist, the purported purpose of which was to assist them in compliance. This is exactly the kind of "hip pocket" policy making Congress intended to prohibit in enacting Section 1417(b).[30]

III. OSERS IS ATTEMPTING AN ADMINISTRATIVE RESOLUTION OF AN IMPORTANT ISSUE ABOUT WHICH THERE IS A CONFLICT AMONG THE CIRCUITS.

This Court should grant the petition for certiorari because the policy enunciated in the New Letter establishes precedent for education agencies about which there is a conflict among the circuits. See *Rules of the Supreme Court*, Rule 10.1(a).

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[29](...continued)
contains no statements about discipline, any reference to the New Letter is unnecessary.

[30] The concern that the Department might force compliance with its wishes simply by withholding funds was expressed during committee hearings:

> "In addition, the National School Boards Association was concerned that unless the compliance office was separate from the program office (either federal or state depending on how the law is drafted), there may be a tendency by the program office to informally turn to unintended means of seeking compliance (*e.g.*, a slow-down in releasing funds)."

Memorandum to Ray Peterson, Council of Chief State School Officers, and Fred Weintraub, CEC, from Mike Resnick, National School Boards Association, on "Forthcoming Handicapped Legislation" (April 1, 1975), p. 3; submitted as Appendix B to Statement by August W. Steinhilber, Assistant Executive Director, Office of Federal Relations, National School Boards Association, on Education of the Handicapped Legislation before the Select Committee on Education, House Committee on Education and Labor (April 10, 1975).

The New Letter is an attempt by the Department of Education to impose an administrative interpretation of IDEA/B, not only in disregard of the restrictions imposed by Congress,[31] as noted above, but in circumvention of the judicial system.[32] If this attempt succeeds, it is highly unlikely that either an SEA or LEA will jeopardize its Federal funding by litigating the underlying substantive issue to resolution.

Despite this Court's previous ruling in *Honig*, there is no settled law within IDEA concerning the discipline of a student with disabilities where there is no nexus between the student's misconduct and the disability. Contrary to the Ninth Circuit's decision in *Doe v. Maher*, which held that educational services can be terminated where no nexus exists, discussed *supra*, p. 9, state and local special education administrators in the Fifth and Eleventh Circuits follow the decision in *S-1 v. Turlington*, 635 F.2d 342 (5th Cir.) (Unit B), *cert. denied*, 454 U.S. 1030, and the decision in *Kaelin v. Grubbs*, 682 F.2d 595 (6th Cir. 1982), which hold that services cannot be terminated under any circumstances.

The New Letter represents an attempt by the Department to make substantive policy[33] on this issue without "offer[ing]

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[31] Congress has directed that "any rules, regulations, guidelines, interpretations, orders, or requirements of general applicability prescribed by the [Department of Education]" comply with the rulemaking procedures of 5 U.S.C. § 553. 20 U.S.C. § 1232(a)(1) (1988).

[32] The potential importance of this correspondence is underscored by this Court's deference to a similar letter in *Honig*. Note 13, *supra* at 484, fn. 8.

[33] The Department's position seems to be based on its interpretation that IDEA's guarantee of FAPE was intended to ensure programming for a student with disabilities regardless of the student's behavior. Perhaps so, but that was not the obvious thrust of Pub.L. 94-142, the statute that first created the Part B grant program under IDEA. As the legislative sponsors, the legislative history and legislative supporters stated time and again, the objectives of Pub.L. 94-142 were to guarantee access to a public education and to assure appropriate educational programming. None of these sources, let alone the statute and implementing regulations themselves, contain one word about disciplinary procedures. Given this uncertainty, it requires an eye far more discerning than

(continued...)

the opportunity for public comment which is normally afforded during the notice-and comment legislative rulemaking process for rules which have the force of law."[34] The Department is subject to the procedural prerequisites of the Administrative Procedure Act in enunciating new policy. 5 U.S.C. § 553. As such, it should have given general notice of the substantive policy contained in the New Letter, as well as an opportunity for public comment.

OSEP's writing of the New Letter most closely resembles similar action by the Chief of the Guaranteed Student Loan Branch of the Department of Education, who responded by letter to an inquiry from the New York State Higher Education Services Corporation.

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[33](...continued)
amici's to discover the gossamer-like nexus between the guarantee of FAPE and OSEP's conclusion in the New Letter. *Amici* agree that Congress intended, as this Court stated in *Honig v. Doe*, to preclude unilateral exclusions of students with disabilities. But since this is a far different result from requiring the continuation of educational programming once it has been determined that the student's misconduct is not related to the disability, *amici* suggest that this is precisely the type of issue for which the formal rule-making process was intended.

[34] The Administrative Conference of the United States has adopted Recommendation 92-2 (June 18, 1992), to be codified at 1 C.F.R. § 305.92.2, which, *inter alia*, urges agencies to make clear that policy statements of general applicability are not binding. Recommendation II., *Policy Statements*, A. "Notice of Nonbinding Nature." The text of the Conference's Recommendation 92-2 is attached to this Brief as Appendix A.

The Administrative Conference has previously urged agencies to use notice-and-comment procedures, where possible, before promulgating an interpretive rule of general applicability or statement of general policy that is likely to have substantial impact on the public. *See* Recommendation 76-5, "Interpretive Rules of General Applicability and Statements of General Policy," 1 C.F.R. § 305.76-5.

Agencies' widespread use of policy statements to bind the public and the implications for administive law generally are discussed and analyzed in Anthony, note 4, *supra*.

> "Although the author of the letter spoke of it as an 'interpretation,' it would seem difficult to point to specific language in the statute that could yield so detailed an interpretation. The threatened sanction compelled compliance by the lending institute, although legislation was not used."

Anthony, note 4 *supra*, at 1342. It is instructive, moreover, that the GSLB letter stated that agency's intention to include its policy in a future notice of proposed rulemaking and admitted "that this Departmental interpretation is of sufficient general interest and importance that all guarantee agencies should be made aware of it. To that end, we are providing a copy of this letter to the National Council of Higher Education Loan Programs, which we have asked to distribute this guidance to its members." *Id.* The policy was included in a subsequent notice of proposed rulemaking,[35] but has not yet been adopted. No similar acknowledgement or steps have been taken by the Department regarding the New Letter. Rather, OSERS reaffirmed its position in a subsequent letter, further stating its "expect[ations] that all States will comply with this requirement." Letter to Ellison Smith, Chairman, SCASS Federal Legislative Committee, from Robert R. Davila, Assistant Secretary, OSERS (January 31, 1992), *as reprinted in* 18 INDIVIDUALS WITH DISABILITIES EDUCATION LAW REPORT 685, 686.[36]

The availability of judicial review, the traditional means to require agency observance of proper rulemaking procedures, is neither efficient, equitable nor, in this situation, likely. Directly contesting Departmental policy can place the challenger in a position of financial jeopardy. Few, if any, state or local education agencies can afford to loose the millions of dollars in Federal funding that might be jeopardized while contesting the

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[35] 55 Fed. Reg. 48,324 (November 20, 1990)

[36] The text of this letter is reproduced in the Appendix beginning at page 7a.

Department's administrative process. *Rogers v. Bennett*, 873 F.2d 1387 (11th Cir. 1989); *Freeman v. Cavazos*, 923 F.2d 1434 (11th Cir. 1991). Accordingly, without this Court's intervention, the Department likely will succeed in its effort to impose an administrative resolution to this important issue of public policy.

CONCLUSION

For the above stated reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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January 28, 1993

APPENDIX

RECOMMENDATION 92-2:[*****] AGENCY POLICY STATEMENTS[******]

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

This recommendation addresses use of agency policy statements. Policy statements fall within the category of agency actions that are "rules" within the Administrative Procedure Act's definition because they constitute "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or describe law or policy," 5 U.S.C. § 551(4). "Rules" include (a) legislative rules, which have been promulgated through use of legislative rulemaking procedures, usually including the notice-and-comment procedures of the Administrative Procedure Act, 5 U.S.C. §553, and (b) nonlegislative rules — that is, interpretive rules and policy statements — which fall within the above definition of "rules" but which are not required to be promulgated through use of legislative rulemaking procedures. Thus, policy statements include all substantive nonlegislative rules to the extent that they are not limited to interpreting existing law. They come with a variety of labels and include guidances, guidelines, manuals, staff

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[*****] As reproduced in Anthony, Robert L., "Interpretive Rules, Policy Statements, Guidances, Manuals and the Like — Should Federal Agencies Use Them to Bind the Public?, 41 DUKE LAW JOURNAL 1311, 1381 (June 1992).

[******] The Administrative Conference of the United States adopted Recommendation 92-2 on June 18, 1992. This text is reprinted from an advance copy of the recommendation provided to the *Duke Law Journal* by Professor Robert A. Anthony. It will be codified at 1 C.F.R. §305.92-2. It has been edited only to conform to the Duke Law Journal's citation conventions.

instructions, opinion letters, press releases or other informal captions.

Policy statements that inform agency staff and the public regarding agency policy are beneficial to both. While they do not have the force of law (as do legislative rules) and therefore can be challenged within the agency, they nonetheless are important tools for guiding administration and enforcement of agency statutes and for advising the public of agency policy.

The Conference is concerned, however, about situations where agencies issue policy statements which they treat or which are reasonably regarded by the public as binding and dispositive of the issues they address.[1] The issuance of such binding pronouncements as policy statements does not offer the opportunity for public comment which is normally afforded during the notice-and-comment legislative rulemaking process for rules which have the force of law. Courts have frequently overruled agency reliance on policy statements as binding on affected persons.

Where the policy statement is treated by the agency as binding, it operates effectively as a legislative rule but without the notice-and-comment protection of § 553. It may be difficult or impossible for affected persons to challenge the policy statement within the agency's own decisional process; they may be foreclosed from an opportunity to contend that the policy statement is unlawful or unwise, or that an alternative policy

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[1] There are many facets that must be assessed in determining whether a policy statement is operationally a rule that binds affected persons. In general, we apply the concept here to agency statements that are usually issued in permanent form and that are relied upon by an agency and its staff to decide policy whose basis, legality, and soundness cannot be challenged within the agency. Whether a statement is a matter of policy or interpretation, is issued in a permanent form, and is in fact binding (or to what extent it is binding) are often difficult questions that can only be decided in context.

should be adopted. Of course, affected persons could undergo the application of the policy to them, exhaust administrative remedies and then seek judicial review of agency denials or enforcement actions, at which time they may find that the policy is given deference by the courts. The practical consequence is that this process may be costly and protracted, and that affected parties have neither the opportunity to participate in the process of policy development nor a realistic opportunity to challenge the policy when applied within the agency or on judicial review. The public is therefore denied the opportunity to comment and the agency is denied the educative value of any facts and arguments the party may have tendered.

The Conference believes this outcome should be avoided, first by requiring that when an agency contemplates an announcement of substantive policy (other than through an adjudicative decision), it should decide whether to issue the policy as a legislative rule, in a form that binds affected persons, or as a nonbinding policy statement.[2] Second, to prevent policy statements from being treated as binding as a practical matter, the recommendation suggests that agencies establish informal and flexible procedures that allow an opportunity to challenge policy statements. Recognizing that each agency's process differs, the choice of which procedures to change in implementing this recommendation remains in the discretion of each agency. Likewise, actions taken during review of the policy statement would not necessarily be affected by such reconsideration.

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[2] The Conference has already urged agencies to use notice-and-comment procedures, where possible, before promulgating an interpretive rule of general applicability or statement of general policy that is likely to have substantial impact on the public. Agencies were urged to use postpromulgation notice-and-comment procedure if it is not practicable to accept and consider comments before the rule is promulgated. *See* Recommendation 76-5, "Interpretive Rules of General Applicability and Statements of General Policy," 1 C.F.R. § 305.76-5.

RECOMMENDATIONS

The following recommendations applicable to policy statements are intended to ensure that, before an agency promulgates substantive policies which bind[3] affected persons, it provides appropriate notice and opportunity for comment on such policies, and makes sure that policy statements are not treated as binding.

I. *Legislative Rulemaking for Binding Policies*

A. Agencies should not issue statements of general applicability that are intended to impose binding substantive standards or obligations upon affected persons without using legislative rulemaking procedures (normally including notice-and-comment). Specifically, agencies should not attempt to bind affected persons through policy statements.

B. When an agency publishes a legislative rule (e.g., in the Federal Register and in official agency publications), the preamble to the rule should state that it is a legislative rule intended to bind affected persons. The preamble should also cite the specific statutory authority for issuing the rule in binding

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[3] As the term is used here, an agency ruling is "binding" when the agency treats it as a standard where noncompliance may form an independent basis for action in matters that determine the rights and obligations of any person outside the agency. This is true whether or not the rule was promulgated in accordance with § 553. A document that was not issued pursuant to § 553, and therefore cannot be binding legally, may nevertheless be binding as a practical matter if the agency treats it as dispositive of the issue it addresses. This recommendation is concerned only with substantive, as opposed to procedural, rules. *See* Recommendation 92-1, "The Procedural and Practice Rule Exemption from the APA Notice-and-Comment Rulemaking Requirements" (to be codified at 1 C.F.R. § 305.92.1).

form as well as the steps that it has taken to comply with procedural requirements.

II. *Policy Statements*

A. *Notice of Nonbinding Nature.* Policy statements of general applicability should make clear that they are not binding. Persons affected by policy statements should be advised that such policy statements may be challenged in the manner described in part B below. Agencies should also ensure, to the extent practicable, that the nonbinding nature of policy statements is communicated to all persons who apply them or advise on the basis of them, including agency staff, counsel, administrative law judges, and relevant state officials.

B. *Procedures for Challenges to Policy Statements.* Agencies that issue policy statements should examine and, where necessary, change their formal and informal procedures, where they already exist, to allow as an additional subject requests for modification or reconsideration of such statements. Agencies should also consider new procedures separate from the context in which the policy statement is actually applied. The procedures should not merely consist of an opportunity to challenge the applicability of the document or to request waivers or exemption from it; rather, affected persons should be afforded a fair opportunity to challenge the legality or wisdom of the document and to suggest alternative choices in an agency forum that assures adequate consideration by responsible agency officials. The opportunity should take place at or before the time the policy statement is applied to affected persons unless it is inappropriate or impracticable to do so. Agencies should not allow prior publication of the statement to foreclose full consideration of the positions being advanced. When a policy statement is subject to repeated challenges, agencies should consider instituting legislative rulemaking proceedings on the policy.

III. *Instructions to Agency Staff*

This recommendation does not preclude an agency from making a policy statement which is authoritative for staff officials in the interest of administrative uniformity or policy coherence. Indeed, agencies are encouraged to provide guidance to staff in the form of manuals and other management directives as a means to regularize employee action that directly affects the public. However, they should advise staff that while instructive to them, such policy guidance does not constitute a standard where noncompliance may form an independent basis for action in matters that determine the rights and obligations of any person outside the agency. Further, agencies are encouraged to obtain public comment on such guidance. Finally, in any case in which staff officials' adherence to such directives may affect a member of the public, care should be taken to observe the requirements of 5 U.S.C. § 552(a) which imposes a publication requirement independent of any obligation to employ notice-and-comment procedures.

TEXT OF LETTER FROM
ROBERT R. DAVILA, ASSISTANT SECRETARY, OSERS,
TO
MR. ELLISON SMITH, CHAIRMAN
SCASS FEDERAL LEGISLATION COMMITTEE

as reprinted in

18 INDIVIDUALS WITH DISABILITIES EDUCATION
LAW REPORT 685

January 31, 1992

Mr. Ellison Smith
Chairman
SCASS Federal Legislation Committee
421 Zimalcrest Drive
Columbia, SC 29210

Your letter to Secretary of Education Lamar Alexander, dated November 27, 1991, has been referred to the U.S. Department of Education's Office of Special Education and Rehabilitative Services (OSERS) for my response. You ask whether, absent a court order, the State of South Carolina must continue to provide a free appropriate public education (FAPE) to children with disabilities who, after full due process, are expelled from the public school districts within the State.

It is OSERS' position that States receiving funds under Part B of the Individuals with Disabilities Education Act (Part B), are required to provide FAPE to all eligible children within the State — including those who have been duly suspended or expelled for misconduct unrelated to their disabilities. This requirement is not driven by whether the State is subject to a court ruling. OSERS' position is based on the language of Part B, its legislative history and the judicial precedents we find most persuasive. Accordingly, OSERS expects that all States that receive Part B funding, including South Carolina, will comply with this requirement.

OSERS would not require a specific assurance concerning the provision of services to a child with a disability who has been expelled under these conditions, unless it had reason to believe, as occurred in OSERS' review of South Carolina's State Plan, that a State did not plan to provide these services. This may account for the different responses you have received when discussing this requirement with other superintendents.

I hope that you find this information responsive to your inquiry.

Robert R. Davila
Assistant Secretary

Supreme Court, U.S.
FILED
JAN 29 1993
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No. 92-929

In the

Supreme Court of the United States

October Term, 1992

Metropolitan School District of Wayne Township, Marion County, Indiana
Petitioner,

v.

Robert R. Davila
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF AMICUS CURIAE OF NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Metropolitan School District of Wayne Township, Marion County, Indiana
Petitioner,

v.

Robert R. Davila
Respondent.

BRIEF AMICUS CURIAE OF NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

This brief is filed with consent of both parties. Letters of consent are on file with the Clerk of this Court.

INTEREST OF THE AMICUS

The National School Boards Association (NSBA) is a not-for-profit federation of this nation's 49 state school boards associations, the Hawaii State Board of Education, and the

boards of education of the District of Columbia, the U.S. Virgin Islands and the Commonwealth of Puerto Rico. Founded in 1940, NSBA represents approximately 97,000 of the nation's school board members, who, in turn, govern the schools attended by 97 percent of all U.S. public school children.

The individuals who compose this nation's school boards are elected or appointed community representatives, most of whom are not professional educators. They are responsible under state law for the fiscal management, staffing, continuity, educational standards and for the adoption and enforcement of standards of student conduct.

Every school district in the country is eligible for funding under the Individuals with Disabilities Education Act (IDEA) and is, therefore, vitally interested in the subject of this case.

REASONS FOR GRANTING THE WRIT

The policy at issue in this case is educationally unsound, in conflict with federal court decisions on the subject and is internally inconsistent. The policy at issue in this case is of vital interest to educators across the country. Respondent, in its zeal to protect children with disabilities, has instead adopted a policy that teaches such children that they are exempt from the rules of society and the consequences of violating those rules. Respondent has misinterpreted the Individuals with Disabilities Education Act and has extended this Court's decision in Honig v. Doe, 484 U.S. 305 (1988), far beyond its parameters.

In addition, there is a conflict in the circuits on the question covered in the policy.

ARGUMENT

Introduction

Amicus agrees with Petitioner's arguments regarding the process by which the policy at issue here was adopted by Respondent. The legal arguments on that question have been adequately addressed by Petitioner and by other amici herein. Amicus files this brief in order to draw this Court's attention to the importance to every school district in this country of the substantive issue raised by the policy, i.e., whether the Act authorizes Respondent to require school districts to continue to provide educational services to properly expelled students with disabilities under circumstances where nondisabled students would forfeit such a right. Respondent's policy is inadequately supported by either case law or the statute itself but the proscription in the policy is certainly clear. If school districts do not follow the policy, they risk losing federal funding under the Act

or, if challenged in an individual case, risk expensive legal proceedings under which the district may be liable for both its attorneys' fees and those of the plaintiff. This case may afford the only practical opportunity school districts will have to challenge the substantive merits of the policy. Amicus is, therefore, taking this opportunity to draw the Court's attention to the substantive legal issue noted above and the serious educational consequences of the policy.

I. Respondent exceeded its authority under the Act by adopting a policy that goes beyond requiring equal opportunity for students with disabilities and, instead, requires schools to provide educational services to students with disabilities that their nondisabled peers are denied.

Section 1415(e)(3) of the Individuals with Disabilities Education Act (IDEA or "the Act"), 20 U.S.C. § 1401 et seq., the so-called "stay put" provision of the Act, provides that a disabled child "shall remain in [his or her] then current educational placement pending completion of review proceedings unless

parents and the school district otherwise agree." This Court held in Honig v. Doe, 484 U.S. at 326, that the provision "means what it says", ruling that there is no implicit dangerousness exception in the Act which would give schools the right to remove a dangerous disabled child from school. The students who were the subject of the decision had emotional disabilities, and their misconduct was a "manifestation" of the disability. Therefore, this Court had no need to address the followup question of whether the Act exempts students with disabilities from state or local rules which terminate all educational services to students who have been expelled from school for misconduct which is not a manifestation of their disabilities.

Respondent's policy cites Honig for the proposition that the "stay put" provision prohibits schools from "unilaterally excluding children with handicaps from the classroom for dangerous or disruptive conduct arising from

their handicapping condition." From its discussion of the holding in Honig, Respondent's policy jumps to a discussion of 20 U.S.C. 1412(1). That section requires each state, in order to qualify for assistance under the Act, to demonstrate that "the State has in effect a policy that assures all handicapped children the right to a free appropriate public education."

Respondent then goes on to rule that "children with handicaps -- including those who have been suspended or expelled -- must be provided a free appropriate public education," regardless of whether the misconduct was a manifestation of the disability. Respondent attempts to support this position by citing Mills v. Board of Education of District of Columbia, 348 F.Supp. 866 (1972). That case is inapposite because, like Honig, it involved children with behavioral handicaps. The action in expelling those children was discriminatory because it punished students

for conduct which they could not control. That action was found by the court to deny equal protection.

Respondent is correct that Mills and another so-called "landmark" case, Pennsylvania Assn. for Retarded Children (PARC) v. Commonwealth, 334 F.Supp. 1237 (E.D. Pa. 1971), were the catalysts behind the Act, but neither case supports Respondent's policy. Both of the cases were brought under the Equal Protection Clause of the Fourteenth Amendment and the resulting consent orders in the cases noted that the school districts had denied equal educational opportunity to disabled students by withholding educational services to the children merely because the children were disabled and it was allegedly too costly to serve them. The requirements in Mills and PARC were designed by the courts to remedy the discrimination against the disabled plaintiffs. Similarly, the requirements in the Act, including the "stay put" and "free

appropriate public education" provisions, were designed to implement Congress' desire to assure that students with disabilities receive equal access to education. Nothing in the Act states or implies that students with disabilities are entitled to a greater level of educational services than nondisabled students or that students with disabilities -- merely because they are disabled -- are exempt from rules which apply to nondisabled students. As this Court pointed out in Board of Educ. of Hendrick Hudson Central School Dist. v. Rowley, 458 U.S. 176, 189 (1982), the first case to interpret the Act:

> Congress found that of the roughly eight million handicapped children in the United States at the time of enactment, one million were "excluded entirely from the public school system" and more than half were receiving an inappropriate education. [Citations omitted.] In addition, as mentioned in Part I [of the opinion] the Act requires states to extend educational services first to those children who are receiving no education and second to those children who are receiving an "inadequate education." § 1413(3).

> When these express statutory findings and priorities are read together with the Act's extensive procedural requirements and its definition of "free appropriate public education," the face of the statute evinces a congressional intent to bring previously excluded handicapped children into the public education systems of the states and to require the States to adopt procedures which would result in individualized consideration of and instruction for each child. . . By passing the Act, Congress sought primarily to make public education available to handicapped children. But in seeking to provide such access to public education, Congress did not impose upon the States any greater substantive educational standard than would be necessary to make such access meaningful. Indeed, Congress expressly "recognize[d] that in many instances the process of providing special education and related services to handicapped children is not guaranteed to produce any particular outcome." [Citation omitted.] Thus, the intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside.

Id. at 192.

This Court discussed both Mills and PARC, concluding that these cases "both held that

handicapped children must be given access to an adequate, publicly supported education." Id. at 193. Respondent's policy, however, requires that schools provide more than an equal opportunity, more than equal access. It requires that school districts continue educational services to students who have engaged in misconduct, unrelated to their disability, which would cause nondisabled students to lose their right to such services. If there is no relationship between the disability and the misconduct, this requirement goes beyond guaranteeing equal opportunity. It is an affirmative requirement that services be provided to a particular classification of persons without any rational basis. The policy not only exceeds Respondent's authority, it denies equal protection rights of nondisabled students.

This Court's decision in Rowley also discussed Pennhurst State School v. Halderman, 451 U.S. 1 (1981). That case held that

legislation enacted pursuant to the spending clause is in the nature of a contract and the terms of the law must be unambiguous and the state must voluntarily and knowingly accept them. This Court held in Rowley, that scattered remarks in the legislative history of the Education of All Handicapped Children Act relating to achievement of maximum potential, were insufficient to meet the Pennhurst standard. Id. at 204, f. 26. Similarly, Congress has not unambiguously declared its intent to exempt students with disabilities from discipline rules applied to nondisabled students. Respondent cites nothing in either the Act or its legislative history that even addresses the issue of school discipline, much less unambiguously requires that students with disabilities should be exempted from penalties requiring the cessation of educational services. Amicus submits that Respondent would not have the authority to adopt the policy at issue here,

even had it offered appropriate notice and opportunity to comment.

II. Respondent's policy interferes with state laws and local rules and regulations on student discipline without any expression by Congress that it intended such a result when it passed the Act.

Historically, states have developed standards for local school boards to set out student conduct policies and penalties for violations of school rules and criminal rules. This Court has recognized on numerous occasions the importance of the state and local policy-making role:

> No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process . . . .

Milliken v. Bradley, 418 U.S. 717, 741 (1974).

Most states either require or permit local school districts to expel students for particularly egregious misconduct and require or permit the district to deny all educational

services to the student during the term of the expulsion.

For example, North Carolina permits student suspension and cessation of all educational services for up to one school year and indefinite expulsion for certain serious offenses. N.C. Gen. Stat. § 115C-391. Massachusetts' statute provides penalties for unauthorized expulsions but implicitly allows expulsion and complete withdrawal of educational services, Mass. Gen. L. Ch. 76 § 16. Texas allows expulsion "without resort to an alternative education program" for commission of certain proscribed offenses, Tex. Educ. Code § 21.3011(b). Colorado, Ohio and New Jersey authorize expulsion of students for certain offenses but include no requirement that educational services be provided during the time of expulsion, Colo. Rev. Stat. § 22-33-106; Ohio Rev. Code Ann. § 3313.66; N.J. Rev. Stat. § 18A:37-2. Minnesota's expulsion statute was amended in

1991 to include a new provision on expulsion of students with disabilities:

> When a pupil who has an individual education plan is excluded or expelled under [the statute] for misbehavior that is not a manifestation of the pupil's disabling condition, the district shall provide special education and related services after a period of suspension, if suspension is imposed. The district shall initiate a review of the pupil's individual education plan within ten days of the commencement of an expulsion, exclusion, or a suspension of ten days or more.

Minn. Stat. § 127.281. Arizona's statute provides for "permanent withdrawal" for certain proscribed offenses, Ariz. Rev. Stat. Ann. §§ 15-840, 15-841. The Arizona Attorney General has ruled that a district may cease all educational services to an expelled handicapped child if the misconduct was not caused by the handicapping condition. Ariz. Op. Atty. Gen. No. 187-044.

State laws, of course, differ in their rules on suspension and expulsion and a minority of states have chosen to require that expelled students be provided educational

services during their expulsion. New York, for example, has no provision for expulsion. However, schools are allowed to "suspend" a child provided educational services are continued. N.Y. Educ. L. § 3214-3e. Connecticut requires school districts to provide alternative educational services to expelled students except where the expulsion arose out of offenses related to drugs or weapons. Conn. Gen. Stat. § 10-233d. In Louisiana, school districts must provide such alternative programs as are specified by the state board of education. La. Rev. Stat. Ann. § 17:416.2. Tennessee's statute encourages the continuation of services during expulsion periods. Tenn. Code Ann. § 49-6-3402 (Supp. 1992). But in each of these states, all students are treated in the same manner so disabled children do not feel that the rules do not apply to them and nondisabled children are not left with the impression that they are being unfairly treated.

Contrary to the majority of state laws in this country, in order to comply with Respondent's policy school districts must treat students with disabilities differently from those without disabilities even where there is no relationship between the misconduct and the disability. Under Respondent's policy, for example, if two students, one with a hearing impairment and one not disabled, were jointly to commit a serious infraction of school rules, such as selling drugs or assaulting a teacher or another student, the hearing impaired child would continue to receive educational services and the other child would lose that right. Since Respondent does not define "educational services" in the policy, parents could argue in the above example that the school must send teachers and a sign language interpreter to the child's home during the time of expulsion in order to provide the required "free appropriate public education." This ludicrous

result was surely not intended by the Congress.

The Act does not provide any guidance with respect to what Congress intended in the area of discipline of students for misconduct unrelated to their disabilities. But Respondent has filled in the void and ruled that Congress, without ever specifically stating so, intended to interfere with the discipline procedures of the local school district and set up a dual system of discipline depending upon whether the children is disabled. It is not conceivable that Congress intended such a result, particularly in view of the fact that expulsion and cessation of educational services has probably been used since the beginning of public education as a disciplinary tool.

This Court was presented with an attack on another time-honored disciplinary tool -- corporal punishment in the case of Ingraham v. Wright, 430 U.S. 651 (1977). The Court ruled

that although some elements might wish to eliminate corporal punishment as a disciplinary tool, nevertheless, the policy decision to eliminate that tool should not be made by the Court. The proper way to make such a choice would be through community debate and legislative action. This Court stated:

> We are reviewing here a legislative judgment, rooted in history and reaffirmed in the laws of many states, that corporal punishment serves an important educational interest.

Id. at 681.

Similarly this Court has recognized that school discipline rules are an important tool in preparing students for life after graduation:

> The role and purpose of the American public school system were well described by two historians, who stated: "[P]ublic education must prepare pupils for citizenship in the Republic . . . . It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of

> self-government in the community and the nation." [Citations omitted.]

Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986).

Respondent has unilaterally, without authority of the statute, developed a rule for universal application to schools across the country which is in opposition to the educational policy of most states.

III. There is a conflict in the circuits on the question of whether educational services can be denied to children with disabilities who are disciplined for misconduct unrelated to their disability.

In 1981 the Fifth Circuit Court of Appeals (later to become the Eleventh Circuit) decided the case of S-1 v. Turlington, 635 F.2d 342, cert. denied, 454 U.S. 1030 (1981), which, although binding only in the Eleventh and Fifth Circuits, has been cited with approval by a number of courts outside those circuits. E.g., School Board of Prince William County v. Malone, 702 F.2d 1210 (4th Cir. 1985); Kaelin v. Grubbs, 682 F.2d 595 (6th

Cir. 1982). S-1 raised a number of issues surrounding the question of whether, and under what circumstances, students with disabilities can be expelled from school.

The court held that "expulsion is still a proper disciplinary tool under the EHA and section 504 when proper procedures are utilized and under proper circumstances. We cannot, however, authorize the complete cessation of educational services during an expulsion period." 635 F.2d at 349.

The Ninth Circuit Court of Appeals decision, Doe v. Maher, 793 F.2d 1470 (9th Cir. 1986), which was subsequently affirmed by this Court in Honig v. Doe, ruled to the contrary. In a very lucid discussion of the issue, the court ruled that, although the Act itself does not directly state that disabled students cannot be expelled for misconduct that is a manifestation of his handicap, it "may be inferred from the Act's history, purpose, terms and accompanying regulations."

Id. at 1481. "Congress, having included seriously emotionally disturbed children within the EAHCA's definition of handicapped children, [citations omitted], must have intended that their handicap-related misbehavior should not be a cause for a cessation of educational services." Id. at 1481-82. The court then went on to discuss the issue of expulsion of students for behavior which is unrelated to the handicap and found no reason for treating disabled students any differently than the nondisabled.

> If the child's misbehavior is properly determined not to be a manifestation of his handicap, the handicapped child can be expelled. [Citations, including a citation to S-1 v. Turlington, supra, omitted.] This conclusion does not conflict with the EAHCA. When a child's misbehavior does not result from his handicapping condition, there is simply no justification for exempting him from the rules, including those regarding expulsion, applicable to other children. Therefore, when a handicapped child is properly expelled, the school district may cease providing all

> educational services -- just as it could in any other case. [Emphasis provided.] To do otherwise would amount to asserting that all acts of a handicapped child, both good and bad, are fairly attributable to his handicap. We know that that is not so.

793 F.2d at 1482.

Although school districts in the Ninth Circuit are authorized by the court of appeals to remove educational services, they apparently risk deprivation of federal funds under the Act if they do so because of the policy interpretation adopted by Respondent. Amicus believes that it is appropriate and compelling for this Court to review this case and require the Department to publish its policy for comment for no other reason than to address the conflict in the circuits. The policy at issue here does not even mention the conflict. It cites only to Mills v. District of Columbia, which as pointed out above does not even support the Department's position.

IV. Respondent's policy sends a message to children with disabilities that they are exempt from the rules of society and will receive its benefits even though they refuse to obey its rules.

Discipline rules serve two functions, one is to maintain order and create a safe learning environment for all students and the other is an education function, to teach students that they are responsible for their actions and when they violate rules they must suffer the consequences. They are rewarded by their hard work and dedication to the rules, and they are punished for their infractions.

Apparently, Respondent is concerned only about the safety function since its policy is completely oblivious to the practical educational implications of the ruling. For example, the decision in Doe v. Maher includes an interesting discussion of the "manifestation" issue, concluding that:

> [A]lthough [the definition of handicap-related conduct] may, depending on the circumstances, include the conduct of handicapped children who possess the raw capacity to conform their behavior to

> prescribed standards, it does not embrace conduct that bears only an attenuated relationship to the child's handicap. An example of such attenuated conduct would be a case where a child's physical handicap results in his loss of self-esteem, and the child consciously misbehaves in order to gain the attention, or win the approval of his peers. Although such a scenario may be common among handicapped children, it is no less common among children suffering from low self-esteem for other, equally tragic reasons.

793 F.2d at 1480 n.8.

There are numerous examples of disabled students seeking to avoid expulsion on the basis that the proscribed conduct was caused by the disability because of the child's low self esteem and need to get attention through any means. Since the school district must continue to provide educational services to the child under Respondent's ruling, the district may take the road of least resistance and give in to the student, thus providing positive encouragement to the child to use his or her disability as an excuse for his anti-social conduct.

In addition to teaching special education students that their disabilities can excuse their misconduct, Respondent's policy in fact teaches them that their disabilities exempt them from the rules. Respondent's policy allows schools to remove the misbehaving student from school away from other students, but the student with disabilities who violates rules continues to receive education services even though his nondisabled peers in similar circumstances would lose that right. What does that scenario tell the child? "I can do what I want and, although I may be removed from the school in order to protect other students -- I will continue to receive services because I am special ed." Amicus has received reports from across the country of students who respond to teachers' admonitions with retorts such as "You can't touch me, I'm special ed." If Respondent's ruling is allowed to stand, this statement of defiance will in fact reflect the law of the land. It

will be a law of ultimate dismay and sore disadvantage to the students who discover that their exemption from the rules dies on graduation.

Respondent's policy correctly notes Congress' reliance on Mills in adopting the Act, but neglects to mention the ample references in the Act to Congress' goal to use the educational process to develop students with disabilities into productive members of society. As pointed out in the committee report on S.6 which became the predecessor to the IDEA.

> The long range implications of these statistics [showing that only 50 percent of the Nation's handicapped children received proper education services in 1974-75] are that public agencies and taxpayers will spend billions of dollars over the lifetimes of these individuals to maintain such persons as dependents and in a minimally acceptable lifestyle. With proper education services, many would be able to become productive citizens, contributing to society instead of being forced to remain burdens. Others, through such services, would increase their independence, thus reducing their dependence on society.

S. Rep. No. 168, 94th Cong., 1st Sess. 9 (1975).

An important part of the educational process is learning to obey the rules of society. Telling a child that he or she is exempt from school penalties imposed on all other children does not prepare that child for life in society and governance by the rules of society. That, of course, includes not only the criminal code but rules established by employers. Disabled students will find it very difficult to survive in the world of work if they believe that the employer's rules do not apply to them. It simply is not fair to the student to carve out an exception merely because he or she belongs to a protected class.

Respondent's policy likewise sends the wrong message to nondisabled children. The primary goal of the Act was to integrate students with disabilities into society, "to encourage handicapped children and

nonhandicapped children to be educated together as early as possible, [so that] their attitudes toward each other in later life will not be such obstacles to overcome." 121 Cong. Rec. S 10961 (daily ed. June 18, 1975) (statement of Sen. Stafford). But how are nondisabled children to feel when they lose their right to educational services for the same behavior as a student with a disability who retains the right? That certainly does little to improve their attitude toward such children.

Even were there authority in the Act for the policy adopted by Respondent, which Amicus believes there is not, nevertheless the educational ramifications of the policy cry out for the opportunity for educators across the land to comment on effect of the policy on the education of all children.

CONCLUSION

The policy at issue in this case is educationally unsound and has no solid basis

in law. Had the Department provided school districts across the country with the opportunity to comment on the policy, the Department may very likely have concluded that there is no basis in law or educational policy for developing a different rule under the IDEA than under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 706, and that rules of the school district should apply in the same manner to both disabled and nondisabled students unless such application has a discriminatory effect (i.e. where the misconduct is a manifestation of the disability).

School districts across the country are vitally interested in this issue and urge

this Court to grant certiorari in this case.

Respectfully submitted

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